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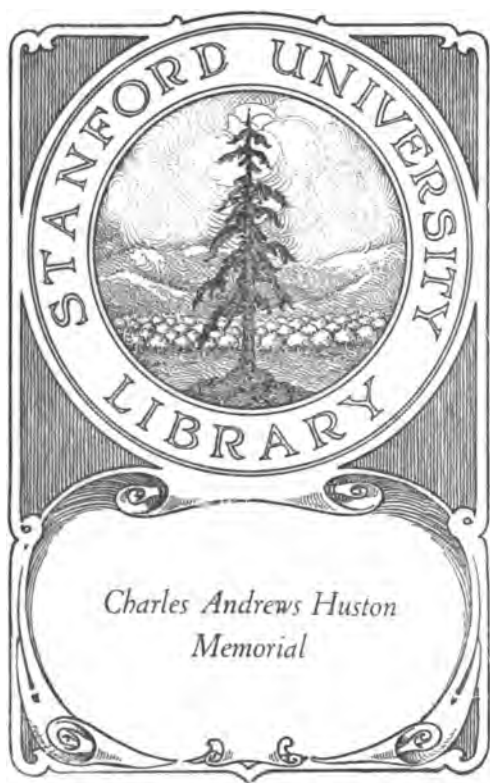
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# INTERNATIONAL CASES

ARBITRATIONS AND INCIDENTS ILLUSTRATIVE  
OF INTERNATIONAL LAW AS PRACTISED  
BY INDEPENDENT STATES

VOLUME I

## PEACE

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CAMBRIDGE . MASSACHUSETTS  
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TO  
JOHN BASSETT MOORE



## PREFACE

THE primary purpose of this collection of international cases is to afford an adequate book for use in the classroom. My own experience as a teacher of international law has made me feel the need of such a book. Many hand-books and systematic treatises have appeared to set forth the principles of the law of nations, and one or the other serves as a basis for the instruction in a majority of the institutions where international law is studied. A rival system which seems more in accord with the nature of the subject is that known as the case method, in which the actual cases or precedents are studied, thus helping the student by an inductive method to arrive at sound principles. He learns directly from the open book of history what is the actual practice of nations, so that he is able to reason out the underlying principles, — his vision is not limited in that he must look through the eyes of one writer. This method is more alive than any course based entirely upon the study of a systematic text can hope to be. But even the case method may be carried to an extreme, and if it is undoubted that textbook instruction can be vitalized by a supplemental study of the cases, it is equally true that the case-book method may be strengthened by a parallel use of some good text. This latter method is the ideal one, and when it is not feasible to require the student to supply himself with a good textbook, constant recourse to the library shelves should be encouraged. In consequence, the explanations supplied by the instructor will be more fruitful. This collection may serve, therefore, either as the basis of classroom study, which is the preferable method, or it may be employed to vitalize the textbook method by a supplemental supply of illustrative cases.

The purpose of  
this collection  
of cases.

In addition to the main purpose of furnishing a book of cases for classroom study, this collection is intended to present a concise account of some of the most important arbitrations. These international arbitrations are employed as illustrative cases under appropriate headings and are interspersed throughout the volume

with other cases in which the procedure of settlement was different. The number and importance of the arbitrations included may be seen in a separate list. All the important Hague arbitrations relating to peace are given in readable form.<sup>1</sup> It is believed that this collection is the only scientific, non-technical account of these important cases. From Professor Moore's monumental and invaluable *International Arbitrations* other important arbitrations have been taken textually, when not of too great length.

The special purposes of the book in no way interfere with its value from a general point of view. The material is of a nature to appeal strongly to all who take an intelligent interest in world affairs. From its pages it is hoped that the reader may derive interesting information as to how nations settle their differences. He cannot peruse the cases and still cherish those twin errors of baneful influence — that there is no international law and that arbitration as now applied is more in the nature of political compromise than a judicial interpretation of existing law. As Professor Moore has pointed out, the difficulty with arbitration is neither in the application of the true principles of international law nor in the enforcement of the decree, but in prevailing upon the parties in disagreement to have recourse to arbitration.<sup>2</sup>

<sup>1</sup> The Timor Arbitration, between the Netherlands and Portugal, and the case of the Maritime Frontier, between Norway and Sweden, alone are omitted, since their interest is mainly geographical and to treat them properly would require maps.

<sup>2</sup> Professor J. B. Moore, reviewing Raeder's *L'Arbitrage international chez les Hellènes* (in the *Political Science Quarterly*, vol. 31, March, 1916) says: "The author of this work in his introduction remarks that the more international arbitration is employed the more reason there is to hope that modern societies will find in it the means of practically solving the difficulties that arise between nations. At the present moment this hope seems to have been discredited. It is just now the fashion to speak of arbitration as an inadequate, ineffective process. In reality, however, the popular disrepute into which international arbitration has temporarily fallen is due not to dissatisfaction with the results but to the refusal or neglect to resort to it. Nations, like individuals, have the choice between trial by judges and 'trial by battle'; and on the part of nations the freedom of choice is less restrained because no form of organization has as yet been found by which the physical force in a populous and highly developed country can be held in check as effectually as can that of the individual in a populous and organized community. But the fact that nations in a particular instance go to war may indicate not that the dispute was incapable or even difficult of judicial or other amicable solution, but simply that one or both of the contestants preferred to take the chance of obtaining by force what justice could not concede. The difficulty was not in the nature of the question but in the disposition of the disputants."

An effort has been made to confine the cases of this volume to a discussion of international law as such, and to omit almost all cases dealing with constitutional or administrative law relating to the fulfillment by the state of its international obligations. For example, suits between the states of our Union are supposed to be decided by the rules applying to independent nations, and yet from the point of view of the law of nations, the separate states of our Federal Union are merely administrative divisions which have no international status. Hence, to include such cases is only confusing and prevents the student from acquiring a firm grasp of the principles of the subject. Similarly, Indian treaties and the status of Indians are excluded as pertaining to constitutional law. The practice of our administrative authorities and the decisions of our courts applying our national legislation governing the rights of aliens or the enforcement of our international obligations are at best illustrative of what this country considers international law. The value of a study of the principles of international law derived by induction from such cases setting forth national views in regard to international relations will be vitiated by whatever error the national viewpoint enfolds. The true principles are best derived from the arguments presented before international arbitrators and weighed in the arbitral awards, or else in the correspondence between governments setting forth their respective views.<sup>1</sup>

The defect from which some collections of cases suffer by rea-

<sup>1</sup> Pitt Cobbett, in his interesting preface, says, in reference to his selection of extracts from decisions by national courts: "I am quite aware that this continual reference to case law as illustrative of topics, which sometimes seem scarcely to come within the domain of the courts, may occasionally appear strained and awkward. Thus, the insertion of the case of the *Cherokee Nation v. the State of Georgia*, as an authority on the subject of state character, of the cases of the *Eliza Ann* and the *Teutonia* on the subject of 'Declaration of War,' may seem to give an untrue idea of the real origin and foundation of the rules of international law on these subjects. My purpose, however, was not so much to indicate the origin of such rules, as to show how far they were sanctioned by the decisions of recognized legal authorities." (Pitt Cobbett, *Leading Cases and Opinions on International Law* [London, 1885], p. vi.).

The purpose which Pitt Cobbett had in 1885 is so well recognized in 1916 that it would seem to justify at this time a more scientific basis for the selection of cases. Mr. Cobbett's third edition (1909) of his valued work bears testimony to the truth of this statement.

son of the inclusion of much material which is not international law is almost equaled by a related deficiency — the omission of all consideration of some of the most important topics because they do not ordinarily come before the national courts. Sometimes an attempt to fill this gap with judicial rubble has led to the inclusion of an irrelevant *obiter dictum* of some learned judge straying wide afield of the case submitted for his decision. The student will derive a greater benefit from the study of the arguments marshaled to support a government's views or action when these arguments are the opinions of such men as Jefferson, Marcy, or Cushing. If we do include an *obiter dictum* of our great Marshall, it must be because of its lucid statement of principle, and not because it comes from a national court discoursing on international law.<sup>1</sup>

Whether arbitral, diplomatic, or judicial, in their nature the aim has been to select a few cases and incidents involving the more important principles. No selection of cases can cover all phases of international law. It is for the instructor to supplement the cases and direct the student to other sources of information.

An illustrative case which would possess all the elements desired as a basis for study is as rare as a perfectly sound horse. The value of any collection must depend on the harmonious combination of cases with a view to the proper emphasis on the most important characteristics of international relations.

The selection of the cases in this volume from the mass of material and the hundreds of cases examined has been determined by the effort to give due weight to the relative importance of the following desiderata:<sup>2</sup>

<sup>1</sup> In certain cases, notably of neutrality, national courts are called upon to interpret international law, and many of these cases constitute our most valued precedents. But even here it must be remembered that the precedent results from the fact that the government of the other state has considered the decision rendered sufficiently in accord with international law not to enter a protest and insist upon an adjustment through arbitration or through the diplomatic channel.

<sup>2</sup> In 1914 a remarkable conference of teachers of international law, representing the principal institutions of learning, adopted the following resolution:

"(a) In the teaching of international law emphasis should be laid on the positive nature of the subject and the definiteness of the rules.

"Whether we regard the teaching of value as a disciplinary subject or from the standpoint of its importance in giving to the student a grasp of the rules that govern the relations between nations, it is important that he have im-



- (1) the most important arbitrations;
- (2) the most important diplomatic incidents discussed between the governments of the principal states;
- (3) a large proportion of recent material;
- (4) cases which are authoritative and which have been important in the formation of international law;
- (5) striking cases of dramatic human interest;
- (6) cases sufficiently simple to be easily comprehended, yet complex enough to be representative and to challenge attention.

In addition, it has been necessary to have regard for the apportionment of the cases under the respective headings. Almost

pressed upon his mind the definiteness and positive character of the rules of international law. The teaching of international law should not be made the occasion for a universal peace propaganda. The interest of students and their enthusiasm for the subject can best be aroused by impressing upon them the evolutionary character of the rules of international law. Through such a presentation of the subject the student will not fail to see how the development of positive rules of law governing the relations between states has contributed towards the maintenance of peace.

"(b) In order to emphasize the positive character of international law, the widest possible use should be made of cases and concrete facts in international experience.

"The interest of students can best be aroused when they are convinced that they are dealing with the concrete facts of international experience. The marshaling of such facts in such a way as to develop or illustrate general principles lends a dignity to the subject which cannot help but have a stimulating influence.

"Hence, international law should be constantly illustrated from those sources which are recognized as ultimate authority, such as: (a) cases, both of judicial and arbitral determination; (b) treaties, protocols, acts, and declarations of epoch-making congresses, such as Westphalia (1648), Vienna (1815), Paris (1856), The Hague (1899 and 1907), and London (1909); (c) diplomatic incidents ranking as precedents for action of an international character; (d) the great classics of international law.

"(c) In the teaching of international law care should be exercised to distinguish the accepted rules of international law from questions of international policy.

"This is particularly true of the teaching of international law in American institutions. There is a tendency to treat as rules of international law certain principles of American foreign policy. It is important that the line of division be clearly appreciated by the student. Courses in the foreign policy of the United States should therefore be distinctly separated from the courses in international law, and the principles of American foreign policy, when discussed in courses of international law, should always be tested by the rules which have received acceptance amongst civilized nations.

"(d) In a general course on international law the experience of no one country should be allowed to assume a consequence out of proportion to the strictly international principles it may illustrate."

This collection of cases, it is hoped, will furnish a basis for class instruction in substantial conformity with the above resolution.

all the cases which have arisen between states when under the régime of war or neutrality have been excluded, so that those selected might show the law of peace in time of peace.

Wherever possible, the exact words of the official representative have been retained and indicated by quotation marks. To

Presentation  
of cases

avoid confusion, quotation marks have not been employed even when the account has been taken textually from some authority who is himself relating the course of events, but in every such instance the fact of such partial or textual borrowings is conspicuously noted in parenthesis immediately following the case or the paragraph containing the extract. We have especially to thank Professor Moore for his kind permission to make such extracts from his *Digest of International Law* and his *International Arbitrations*.<sup>1</sup> The exact words of the statesman bring home the real nature of international intercourse better than any paraphrase can hope to, and where for lack of space it has been necessary to abridge, every effort has been made to adhere as closely as possible to the original. The same may be said in regard to translations. After all, it must not be forgotten that there is as yet no technical language of international law, and even when French itself, the official language of diplomacy, is employed, the genius of the language abhors the employing of words in a technical sense. The simplest expression of the fundamental idea is the fit language for international law. The aids to its comprehension are familiarity with the practice of independent states and breadth of vision. In many instances it is necessary to comprehend the principles of the Roman law, which as "written reason" was applied to settle many a controversy between the states of Europe.

The estimate of the value of the cases as precedents illustrative of the law of nations must change in the light of each advance in science. It is better that the student should exercise his own critical faculties, assisted by the instructor, than that he should find the cases clogged with footnotes giving the authors' view of the law and their interpretation of the illustrative case.

<sup>1</sup> Much of the material in this volume has come from these two works, where the student will find the fuller references and amplification of instances to widen his knowledge.

An effort has been made to obviate the inconvenience due to the absence of explanatory notes by means of the index, which combines in a convenient alphabetical arrangement the following features:

- (1) a dictionary or glossary, defining some of the most important words, and giving the meaning of foreign and unusual words, when a translation in brackets is inadequate;
- (2) a list of the cases considered and important citations of others;
- (3) an index of subject-matter, so that it will be easy to utilize the material of the whole book;
- (4) names of the statesmen and judges, with references to their statements;
- (5) cases and incidents classified under the states to which they relate;

The classification of the material selected does not follow any existing model. There is no accepted systematic classification of international law, and we have not found it feasible to follow any model in our arrangement of the material. Classification The limitations of a case book make necessary a simple division into chapters with few subheadings—a mere skeleton about which the flesh may form. The test of any classification is, first, its usefulness or practicability, and, second, its accuracy, so that each instance may easily be placed and rediscovered under its proper heading. We hope that the classification which we offer may demonstrate its superiority over many of the antiquated systems now employed, but even should the instructor prefer some other plan, his students will be helped to avoid the error, so natural to the uninitiated, that there is something sacred and unalterable about any classification they may chance to study. No words need be wasted in explanation, since the plan of classification adopted can easily be understood at a glance.

No rules can be given to direct the student in the use of the cases, since the system employed will depend very much upon the methods of instruction followed; yet subject to Method of study such correction and modification as the instructor may furnish, the student will find it profitable to consider the following suggestions:

Never attempt to learn the cases by heart, since such a habit tends to blunt the reasoning faculties.

After reading the case through thoroughly and deliberately, shut the book and repeat over aloud the substance of the arguments on both sides, concluding with a statement of the decision and the action taken. This rehearsal is very important, because, when the student comes into class and says a word or two, there will be a tendency for his tongue to follow freely in the groove previously worn by his spoken word. After this first repetition, let the student, before he looks again at the book, write out very briefly the main point or points in dispute, after which let him speak aloud (or write, or both) what he thinks is the law or principle applicable (conscious always of the probability that his reply is deficient).

The next step may well be to consult one or more authorities, rigidly turning aside from all side issues (or he will never finish the case) until he finds a consideration of the principle applicable. Then let him return to a second reading of the case in the light of his reflection and study of the sources, when, unless the case is very involved, he should reach such a thorough understanding of it, as to make it easy for him to repeat the case aloud to himself. He is now ready to recite it with fluency in the classroom.

If time allows, the student may try several further means to deepen his acquaintance with the principles involved in the case.

It is essential for the student to fix the main principles in his mind before he attempts to retain or understand matters of detail.

As the instructor may ask him to criticize or defend the views expressed, he should have firmly in his grasp the necessary arguments and references to sources. It is here that he should avail himself of his capacity for accurate memorizing and should refer to the sources, giving exact names, editions, even page numbers, when he can be sure. Especially should he acquire the habit of referring to treaties by the name of the city of signature, and by the date of the month as well as of the year.

Every student should take occasion to interpose from time to time in the discussion, if for no other reason than to acquire the habit of participating in the work of the class. Many a good

student, through shyness or for other reasons, loses a valuable opportunity to deepen his mastery of the subject. These interruptions will not be resented by the instructor and members of the class, if they are not too frequent and if the question or remark be tersely stated. Someone has said that if you do not want to be a bore, you must drop the subject the moment your statement is understood. Just so in the class. The point or objection should be concisely stated to the best of the student's ability, and dropped in mid-course as soon as the meaning is clear.

In the recitation, each side of the question may be assigned to a different student, who will be asked to present the arguments for his side, and then to refute those of the other. This course may be advantageously applied by two or more students working together. Each one can represent in the discussion one of the governments concerned. This moot-diplomacy method may be used in the cases of arbitration, and the important questions of arbitral procedure can thus be taken up in conjunction with the study of the principles decided in the awards.

This method can be further used to advantage for a more detailed and complete study of the practice of diplomacy than any textbook can provide.

These with other variations may be employed by the teacher, when the members of the class have had sufficient experience and acquaintance with the principles to make such modifications of the routine class methods profitable.

The greatest danger in using the case system is that a few of the better men do all the work, and unless the class is to be inflicted with the intolerable burden of a halting recitation, a few soon become spokesmen for the class. To obviate this, the instructor must permit interruption even when it breaks into the thread of the argument, and give an encouraging answer, so that the interrupter feels well pleased with his achievement. The important argument can then be resumed where it was left off.

When time presses and the cases have accumulated, many pages may be covered by short, incisive, searching questions, which allow the student to show his mastery of the case, whereupon the instructor turns to the succeeding case.

Of course the class should not be taken in alphabetical order — or too systematically. Constant side questions, often answerable by a *yes* or a *no*, will keep all upon the *qui vive*, without confusing the statement of the case or wasting time.

It is important to acquire the habit of referring to the cases by name, and it will be preferable to announce that the examinations will be based upon the cases in the book and upon others closely analogous. The instructor may prepare such cases for examination purposes, varying in difficulty according to the capacity of the students, and involving principles or facts similar to the cases studied but not always identical with them. In discussing such cases, students will find occasion to refer to the cases in the text and to make application of the principles they illustrate.

Without keeping any record of the recitations, the instructor will be able to follow the work of the students, if the class is not too large, and to rely upon the eagerness to learn as the sole stimulus. Where the preceptor does not feel justified in thus throwing the entire responsibility upon the student, he may, of course, keep an accurate account of the recitations and notify the delinquents from time to time.

In conclusion, I would emphasize that this collection of cases does not claim to cover every principle, but only those best recognized or most important. The supplementary use of some good text book should be urged upon every student. The selection of cases should, however, constitute the basis of the work of the class. At the same time the better students should be allowed and encouraged to pursue their investigations further afield.

It is almost inevitable at times that several recitations will be spent upon one assignment, but by lengthened assignments and increased speed of recitation, the instructor will be able to regain the lost time. Skipping is to be avoided, since it always discourages a class not to recite the lesson for which it has made careful preparation. The course can easily be lengthened by supplemental lectures or additional cases assigned for investigation and report by some of the more advanced and enthusiastic students.

In addition to the general aids to the study of cases as given

above, it will be well for the student to ask himself whether the case he is studying is properly and well placed under the heading of the book, or whether it does not more properly belong under another section. From time to time the student should re-read these preparatory remarks in regard to the methods of study, and the introductory chapter explaining how to find the law. In reference to each case, he may find some useful hints in the index, but it will be better for him to search out from other sources all the explanation of the cases, and consult the index only after he has put forth his own efforts. In this way the index will not become a lazy man's mental crutch, but will serve as a useful indication of the success of his research and as guide for his investigations in a succeeding case.

Special directions to the student

Students who wish to attain a profound knowledge of international law should early acquire the habit of consulting the principal sources and authorities. The following are among the more important:

Moore: *International Arbitrations* (1898), 6 vols.

Moore: *Digest of International Law* (1906), 8 vols.

*Foreign Relations of the United States.*

*British and Foreign State Papers.*

*American Journal of International Law.*

Malloy: *Treaties*, 2 vols., 1910; 3d vol., 1913.

Westlake: *International Law* (2d edition), 2 vols., Part I, *Peace*, 1910; Part II, *War*, 1913 (Cambridge University Press).

Further bibliographical indications will be found in the preceding and in:

Hershey: *The Essentials of International Public Law* (1912, Macmillan).

Oppenheim: *International Law* (2d edition, 1912); vol. I, *Peace*; vol. II, *War and Neutrality* (Longmans, Green & Co.).

Moore, Hershey and Oppenheim all give references to non-English sources.

Although the original plan of the book and the selection of the cases are mine, Mr. Munro deserves the principal credit for the preparation of the material which is new. The unique account of the Hague Arbitration Cases,

Authorship

which are the backbone of the book, are almost entirely his work.<sup>1</sup>

We cannot adequately express our thanks to Professor Moore for many suggestions which have been followed with profit, nor for the extensive borrowing of material from his two Digests. We have preferred to acknowledge that what he has done cannot be improved, rather than to seek after a vain appearance of originality. Much of the material is nevertheless newly prepared, and that which is taken over from other sources will be made available for use in the classroom, whither the many-volumed works of the great collections of sources cannot conveniently be carried.

We acknowledge our debt to Miss Helen C. Nutting for the preparation of the material in the *Mattueof* case and the *Pritchard* affair, as well as for the care with which she has checked up references and helped to correct the proof.

E. C. S.

COLUMBIA UNIVERSITY,  
*March, 1916.*

<sup>1</sup> While Mr. Munro was assisting Professor Wilson at Harvard he had an opportunity to pursue, with a group of advanced students taking Dr. Wilson's course on the Hague Arbitrations, the critical study of those cases. No work could have been more beneficial as a preliminary to the preparation of these cases, though it in no way lessens the originality of Mr. Munro's contribution.



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## PART I

### DIPLOMACY: THE INTERCOURSE OF STATES

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## INTRODUCTION

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### THE SOURCES OF INTERNATIONAL LAW: HOW TO KNOW THE LAW

IF the reader or student were to place himself in the position of the officials who are entrusted with the direction of the foreign relations of the government, he would have to ask himself: Where shall I look for the guide of my action?

In such circumstances the first rule of conduct must be — in lieu of a better — to follow the practice of his predecessors in office. This merely would mean to apply the system which the newly appointed official finds in operation. Since, however, no two cases are identical, before the official can decide what action to take in any particular instance he must first have discovered what are the governing principles of the existing practice. He will find that the first means of ascertaining them will be to search out the precedents upon which the position taken by the government is based, and thus advised, he will attempt to maintain what he considers to be this position of his state. He will, however, always take into account the protection of the immediately important interests of his country. Every government attempts to secure the recognition of its views as shown by its practice, interpreted in such a way as to protect the nation's interests. This same procedure pursued by the officials of another government may result in a stand quite at variance with that of the first-mentioned government. What will those responsible for the effective direction of their country's foreign affairs do in such a case?

The first proceeding, which is also the easiest and simplest, is to reach some direct agreement for the settlement of the matter. Since, however, it is more convenient to have a general rule than to waste time in reaching a separate understanding for each separate instance, governments enter into broader agreements,

called conventions or treaties,<sup>1</sup> to regulate these matters. Another advantage of this mechanism is that the governments concerned are able, through mutual concessions in regard to points of minor importance, to obtain a compromise rule of regulation embracing what each considers essential. This method of solution by compromise agreements, based upon reciprocal concession, is the foundation of the body of conventional or treaty stipulations which govern such a great proportion of the relations between states, and also of the less formal agreements effected through exchanges of notes or other friendly understandings.

Considerations of convenience will always lead diplomats to expedite the matters entrusted to their charge by the simple and effective method of reference to treaty stipulations or by entering into some agreement made for the event. Such a means is employed to transact a great part of the business between independent states. It may be said that every such instance is governed by the well-recognized and fundamental principle of international law that all agreements must be observed in good faith — *pacta servenda sunt*. But in those cases where no treaty or other agreement is recognized by both parties as applicable, it may not always be possible to reach a satisfactory agreement at the moment, and where a solution presses it becomes necessary to supplement by other rules the one which we have just enunciated.

The next or second rule for a government to employ to determine its conduct looks to the observance of the previous practice in the absence of some rule demonstrated to be superior. When, however, the rule of a compromise agreement between the views of the governments themselves based upon the national practice and interests of each of the governments concerned, has not proved

<sup>1</sup> From time to time the representatives of the nations in conclave have entered into treaties binding their respective states to observe certain rules of general application. This is sometimes a codification of existing law to make easier its application and to avoid disputes. Again, it may be a conventional rule, for the regulation of questions of minor importance, where the primary consideration is to obtain a fixed rule. In still other instances the rules agreed upon may really be in the nature of legislation for the future. In this latter event, enthusiasm without experience often seeks like Canute to arrest by words the irresistible advance of the forces of nature. Experienced statesmen are cautious and modest in their attempts to originate legislation for the world.

efficacious, recourse must be had to another practice than that of each nation considered separately. The general practice of independent states, as shown in previous controversies, must now be considered. If it is found that similar differences in the past have been regulated by two governments in a particular manner, the officials of the two governments in disagreement will, ordinarily, follow this practice. When the precedents are numerous and extend over many years, the practice becomes a custom.<sup>1</sup>

<sup>1</sup> It is natural that men should apply to the settlement of international affairs the same rules with which they have been familiar as governing all their social relations in more restricted fields — that is, in national or local affairs. We find the most generally prevalent and deeply revered rule to be that of the obligation to observe the solution which has been followed in other cases stretching back beyond the memory of man — what is known as a custom. The recognition of the validity of custom has two practical advantages. In the first place, custom almost universally means that when similar difficulties have occurred in the past, a peaceful solution was reached, and that this solution worked sufficiently well to lead to its adoption when other similar situations occurred — in other words, there is a presumption that the custom so followed is a practical and reasonably satisfactory rule to apply. The second advantage of a customary rule is that it is fixed. All who follow custom do so on the assumption that all recognized customs will be given due consideration in the settlement of any difficulties which may arise. Even where it is not possible to find a well-defined custom, governments, actuated by the considerations above referred to, are generally ready to accord to isolated precedents a large measure of respect.

Westlake states that "custom and reason are the two sources of international law," and says in regard to the former: "Custom must not be confounded with mere frequency or even habit of conduct. In any state or other society in which customary law is admitted, custom as a part of law means the conduct which is enforced as well as the strict or loose nature of the society allows, — not always very well, even in the case of national law in the ruder stages of national existence, — and which is followed as well from the fear of such enforcement as from the persuasion that the received rule requires such conduct to be followed. In other words, custom is that line of conduct which the society has consented to regard as obligatory. We have seen that international law is law just because the conduct which it directs has the character thus described, so that for custom to be a source of international law follows from the definition of each. Even for those who seek for international right — *le droit international*, or *das Völkerrecht* — custom must be a source of such right so far as the existence of the custom carries a presumption of its reasonableness, and so far as in ordinary cases there is a duty of conscience to follow it, at least provisionally, until it can be amended." (Westlake: *International Law*, part 1, *Peace* [Cambridge, 1910], p. 14.)

The learned Lorimer remarks in regard to custom as a source of international law: "From Vattel's time, again, till our own, partially including the latter, the effort has been to determine the consuetude, which is accepted as the common law, without reference to any absolute or necessary standard, and positive law is criticised or amended only in accordance with prevailing sentiments, or with such experience of its results as recent historical events are supposed to afford. Even where these experi-

¶ When governments have not been able to reach a satisfactory settlement, either by means of a compromise agreement or by the application of a recognized international customary rule based upon the practice of governments, unless the matter is to be left to the realm of force, it will be necessary to discover still other means. Recourse must then be had to reason to search out the fundamental principles. Customary rules must be investigated to discover the principles which they enfold; and when a certain provision is found in many treaties oft repeated, reason must discover the true underlying principle which is the fertile soil to which the provision owes its growth. The overburdened statesmen who bear the great responsibility of the conduct of foreign affairs might well stagger before the task of applying their reasoning faculties to the discovery of such principles and their correct application to the actual difficulty. Nay, in many instances it would be beyond their powers. Fortunately, however, this work has been in great part prepared and lies ready at hand. Jurists and students of international affairs of all nations have been diligently devoting their attention to this very task. In the textbooks and commentaries are found the results of their investigations and mature deliberations. The bias which may be suspected when an author treats of the interests which affect his beloved country disappears before a consensus of authoritative interpretation gathered from the textbooks prepared by jurists of all nations and in all tongues.<sup>1</sup>

Such in the main is the method which governments pursue to ences amounted to a custom, which we have seen to be one of the most important sources of the law of nations, Savigny's profound remark [*Die Gewohnheit ist das Kennzeichen des positiven Rechts, nicht dessen Entstehungsgrund.* — *System*, vol. I, p. 35], that 'custom is the mark by which we recognize positive law, not the ground from which it springs,' was entirely overlooked." (Extract from Lorimer: *Institutes of the Law of Nations* [1883], vol. I, pp. 81-82.)

<sup>1</sup> "Reason is a source of international law not only for the seekers after international right, who will appeal to reason as a check on custom, but for all, and for two causes. First, the rules already regarded as established, whatever their source, must be referred to their principles, applied, and their principles extended to new cases, by the methods of reasoning proper to jurisprudence, enlightened by a sound view of the necessities of international life. Secondly, the rules as yet established, even when so applied and extended, do not cover the whole field of international life, which is constantly developing in new directions. Therefore, from time to time new rules have to be proposed on reasonable grounds, acted on provisionally, and ultimately adopted or rejected as may be determined by experience, including the effect,

find a fixed rule applicable to the peaceful settlement of differences between them. In rare instances no accord is possible and by mutual agreement the difference is sometimes referred to arbitration. The advantages of arbitration are, first, that the parties secure an impartial judge to apply the same system of international law which they would ordinarily apply themselves; and, second, that they isolate the question from all other disturbing influences. A third advantage is that they get rid of the question. They agree to agree at a fixed date, which is the date when the award is rendered. Governments, in their relations one with another, under the pressure of political considerations sometimes not less important in international than in national affairs, of interest coupled with preponderating power.

"With both custom and reason in our subject Roman law is so intermixed that its position requires a separate notice to make it clear. Modern international law arose at a time when the larger part of the world was subject to monarchical rulers with whom their states were identified, and the Roman law was held to apply between such persons as being the law common to them. The states of other than monarchical constitution which had dealings with monarchs or with one another would have had to submit to the rules which naturally existed in the more general case, even if, by claiming rights as moral beings, they had not brought themselves under the Roman law as the one code then deemed to be obligatory on moral beings. The rules which flowed into international law from this source are now incorporated with the customary law of nations, and such is the respect still generally entertained for the Roman law, which has been called written reason, that this part of the customary law is never controverted even by the seekers after international right, although it may be the subject of some of the controversies which are waged about the interpretation of texts. Further, in applying to international law the methods of reasoning which belong to jurisprudence, it is the reasoning of Roman law that has been applied, that system being common not only to the continent of Europe but also to the English Court of Admiralty." (Westlake: *International Law*, part 1, *Peace* [Cambridge, 1910], pp. 14-15.)

A very important organ which helps to elucidate the true principles of international law is the Institut de Droit International (Institute of International Law). Among its members are some of the most learned jurists and distinguished statesmen. It holds meetings every year or two to discuss international law as applied to questions of pressing or general interest. A reporter entrusted with the preparation of each subject for discussion has previously been in correspondence with each member so that the proposals which he lays before the meeting are the results of mature and wide consideration. After discussion, each article of the project or proposal is voted upon with the amendments suggested. In the final form in which it is adopted, the project or proposed regulation is printed in the *Annual* of the Institute, with a reasonably full account of the discussions, and carries on its face the authority of the whole Institute. When, however, the voting has been close, it is necessary to examine the opinions and weigh the authority of the separate votes cast. Reason can never be discovered by the vote of a majority, though in a world where the strength of a majority has an influence so far-reaching, a majority vote of those supposedly or presumably equal will itself have in its favor a presumption of reasonableness.

depart from what they know to be the application of the well-recognized rules of the law of nations. By insisting on the recognition of some national viewpoint in return for a reciprocal complaisance, governments are able to apply or to misapply international law with a view to the protection of those vital interests which are designated as policies. It is necessary always to bear in mind this important distinction between international law and those other matters which are properly characterized as political. The superficial observer of international relations does not always perceive that what he considers as law is often in reality political action stalking in the guise of legality. Diplomacy is a practical system applied by practical men, desirous of obtaining practical results for their governments, and they do not hesitate to cloak a political situation with a legal phraseology when they think it will help to secure a more general and cheerful acceptance.<sup>1</sup> Experience will teach where to look for these political pitfalls.

To recapitulate, governments follow a system of rules based, as we have seen, upon:

- (1) The sanctity of treaties and other agreements which must always be observed with absolute good faith.
- (2) Custom, which demonstrates the actual practicality of a rule of action, and furnishes thereby a presumption in favor of its reasonableness.
- (3) Reason, which is man's only sovereign guide, since reason may always overrule any other rule—for all rules are but aids to reason and abase themselves in reason's majestic presence.<sup>2</sup>

The system of law thus established is the law governing the

<sup>1</sup> Diplomacy is concerned with the carrying on of the relations between governments of independent states. Every government directs its diplomatic activities for the accomplishment of two main purposes:

First, to secure the enjoyment of the rights which belong to it under international law; and

Second, to maintain and extend the particular ideas and beliefs, known as policies, which it cherishes. The latter phase of diplomacy we can consider only incidentally.

<sup>2</sup> The system of international law is mainly contrived to avoid the dangers of irresponsible conceptions of reason: as is well understood, our reason follows all too closely our wishes and our passions. Responsible statesmen find their principal task to save their nation from the errors in reasoning which the popular hatred or enthusiasm of the moment may engender.

society of independent states.<sup>1</sup> It may be more concretely stated as a rule of conduct actually observed by the governments of independent states in their intercourse with one another, and by them recognized as binding and enforceable by appropriate action.

International law is not a system constructed to conform with our ideals of what the practice of governments should be. However beautiful such a scheme might be, it would have little relation to human affairs. It may, nevertheless, be our duty to use our influence in securing the recognition by the states of the world of certain of these ideals. When recognized as law and actually applied by the consensus of states, what was an ideal or precept of morality answers the tests and becomes a part of the law of nations.

In the concrete cases which follow, the reader will find a repetition of what has been said above, though expressed in varied language. With just one warning, to note with particular attention what governments do rather than what their representatives say, we leave the student to pursue uninterruptedly his quest of that sublime, far-reaching, and all-controlling law which, governing the relations of all the states, governs thereby every man, woman, and child dwelling on this planet; for states are but the corporate expression of the individuals who compose them. And as the science of the law of nations develops, the individual emerges as the real if not the legal subject of that law.<sup>2</sup>

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### TRIQUET v. BATH (1761)

*Lord Mansfield*, in the Court of King's Bench:

I remember in a case before Lord Talbot, of *Buvot v. Barbut*, upon a motion to discharge the defendant, (who was in execution for not performing a decree,) "Because he was the agent of com-

<sup>1</sup> Westlake: *International Law*, part 1, *Peace* [Cambridge, 1910,] p. 1.

<sup>2</sup> Strictly speaking, the law of nations deals only with the relations between governments, and individuals are not, therefore, its subjects; but in the recent Hague Convention Relative to the Establishment of an International Prize Court (article 4), an individual who alleges that his property has been condemned in violation of international law is permitted to bring his suit against the government responsible.

merce, commissioned by the King of Prussia, and received here as such;" the matter was very elaborately argued at the bar; and a solemn deliberate opinion given by the court. These questions arose and were discussed. — "Whether a minister could, by any act or acts, waive his privilege." — "Whether being a trader was any objection against allowing privilege to a minister, personally." — "Whether an agent of commerce, or even a consul, was entitled to the privileges of a public minister." — "What was the rule of decision: the act of parliament; or, the law of nations." Lord Talbot declared a clear opinion — "That the law of nations, in its full extent, was part of the law of England." — "That the act of parliament was declaratory; and occasioned by a particular incident." — "That the law of nations was to be collected from the practice of different nations, and the authority of writers." Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Bynkershoek, Wicquefort, etc.; there being no English writer of eminence, upon the subject.

I was counsel in this case; and have a full note of it.

(Textual extract. Burrage: *Reports*, vol. III, p. 1478.)

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### THE *PAQUETE HABANA*

*The Supreme Court of the United States, 1899*

The fishing smack *Paquete Habana*, 43 feet long on the keel and of twenty-five tons burden, with a crew of three Cubans and carrying a fishing license from the Spanish Government, had been fishing for several days off the coast of Cuba. On April 25, 1898, she was captured by the United States gunboat *Castine*. Her cargo was fresh fish kept to be sold alive. The owner of the vessel was a Spanish subject of Cuban birth living in Havana. On May 30, 1898, a final decree of condemnation and sale was entered, "the court not being satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure."

On appeal from the decision of the District Court the case came before the Supreme Court. *Mr. Justice Gray*, after reciting



the facts substantially as above given, disposed of a technical objection to jurisdiction of the court, and continued as follows:

"We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

"By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

"This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law, notably in 2 Ortolan, *Règles Internationales et Diplomatie de la Mer* (4th ed.), lib. 3, c. 2, pp. 51-56; in 4 Calvo, *Droit International* (5th ed.), §§ 2367-73; in De Boeck, *Propriété Privée Ennemie sous Pavillon Ennemi*, §§ 191-96; and in Hall, *International Law* (4th ed.), § 148. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world. . . .

[Here follows an extremely interesting review of the practice of governments in regard to fishing vessels from the beginning of the fifteenth century, with citations from treaties and extracts from the opinions of judges and the writings of authorities on the law of nations. The opinion then continues:]

"Lord Stowell's judgment in *The Young Jacob and Johanna* (1 C. Rob. 20), above cited, was much relied on by the counsel for the United States, and deserves careful consideration.

"The vessel there condemned is described in the report as 'a small Dutch fishing vessel taken April, 1798, on her return from the Dogger Bank to Holland;' and Lord Stowell, in delivering judgment, said: 'In former wars, it has not been usual to make captures of these small fishing vessels; but this rule was a rule of

comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment, and, as they are brought before me for my judgment, they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade.' And he added: 'It is a farther satisfaction to me in giving this judgment to observe that the facts also bear strong marks of a false and fraudulent transaction.'

"Both the capture and condemnation were within a year after the order of the English Government of January 24, 1798, instructing the commanders of its ships to seize French and Dutch fishing vessels, and before any revocation of that order. Lord Stowell's judgment shows that his decision was based upon the order of 1798, as well as upon strong evidence of fraud. Nothing more was adjudged in the case.

"But some expressions in his opinion have been given so much weight by English writers, that it may be well to examine them particularly. The opinion begins by admitting the known custom in former wars not to capture such vessels — adding, however, 'but this was a rule of comity only, and not of legal decision.' Assuming the phrase 'legal decision' to have been there used, in the sense in which courts are accustomed to use it, as equivalent to 'judicial decision,' it is true that, so far as appears, there had been no such decision on the point in England. The word 'comity' was apparently used by Lord Stowell as synonymous with courtesy or good will. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. As well said by Sir James Mackintosh: 'In the present century a slow and silent, but very substantial mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage, and becomes part of the

law of nations.' (*Discourse on the Law of Nations*, 38; 1 *Miscellaneous Works*, 360.)

"The French prize tribunals, both before and after Lord Stowell's decision, took a wholly different view of the general question. In 1780, as already mentioned, an order in council of Louis XVI had declared illegal the capture by a French cruiser of *The John and Sarah*, an English vessel, coming from Holland, laden with fresh fish. And on May 17, 1801, where a Portuguese fishing vessel, with her cargo of fish, having no more crew than was needed for her management, and for serving the nets, on a trip of several days, had been captured in April, 1801, by a French cruiser, three leagues off the coast of Portugal, the Council of Prizes held that the capture was contrary to 'the principles of humanity, and the maxims of international law,' and decreed that the vessel, with the fish on board, or the net proceeds of any that had been sold, should be restored to her master. (*La Nostra Signora de la Piedad*, 25 Merlin, *Jurisprudence, Prise Maritime*, § 3, art. 1, 3; S. C. 1 Pistoye et Duverdy, *Prises Maritimes*, 331; 2 De Cussy, *Droit Maritime*, 166.) . . .

"This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

"The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

"Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

"This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter. . . .

"Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause; and it is therefore, in each case,

"Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs."

(Extract from *United States Reports* [Cases adjudged in the Supreme Court at October Term, 1899. New York, 1900], vol. 175, pp. 677-721. The statement of facts is condensed.)

## **PART I**

### **DIPLOMACY: THE INTERCOURSE OF STATES**



# INTERNATIONAL CASES

## CHAPTER I

### THE RIGHTS AND DUTIES OF THE AGENTS OF INTERNATIONAL INTERCOURSE

#### § 1. DIPLOMATIC REPRESENTATIVES

#### CASE OF MATTUEOF, AMBASSADOR OF PETER THE GREAT (1708)

IN London in the summer of 1708 "several turbulent and disorderly persons . . . in a most outrageous manner insulted the person of his excellency, Andrew Artemonowitz Mattueof, ambassador extraordinary of His Tsarish Majesty, Emperor of Great Russia, . . . by arresting him and taking him by violence out of his coach in the public street, and detaining him in custody for several hours, . . . contrary to the law of nations, and in prejudice of the rights and privileges" of ambassadors and other public ministers.<sup>1</sup> The arrest was made on warrant, by officers of the police, at the instance of certain London tradespeople, to whom the ambassador, then about to terminate his residence in England, owed altogether some three hundred pounds. English gentlemen furnished bail, and Queen Anne, as soon as she heard of the mischance, dispatched her Secretary of State to wait upon the ambassador and assure him of Her Majesty's sense of the outrage and of her intention to prosecute according to the full rigor of the law all those who should be found implicated. The ambassador, however, demanded a more striking and summary exoneration and left London hastily, as soon as he received his passports, without asking for his letters of recall, and without accepting the customary gift from the Queen or the yacht which

<sup>1</sup> "An act for preserving the privileges of ambassadors, and other public ministers of foreign princes and states." (*Statutes at Large from the second to the eighth year of Queen Anne*, vol. xi, pp. 487-89.)

she had caused to be offered to him. The Queen and her ministers seem to have made every effort in this case to fulfill their obligations under international law. The tradesmen, the bailiffs, the justices responsible for issuing the warrant, were arrested and when, on the 25th of February of the year following they came to trial before the Queen's Bench, eminent lawyers pleaded long and learnedly for Her Majesty before a distinguished jury in the presence of both Her Majesty's Secretaries of State and many other persons of rank and authority. A verdict of guilty was found but "the case being so extraordinary, of very great importance, altogether new, and without precedent" in the courts of England, — so it was officially communicated to the Russian Ambassador, — the Lord Chief Justice hesitated to pronounce sentence until in special session of the term following it should be determined what penalties might properly be inflicted on those found guilty in cases of this nature. Moreover, when Parliament convened and a general pardon was declared to all persons guilty of criminal acts from the year 1695, "even to those who in the most enormous manner might have conspired" against the "sacred person" of the Queen, exception was made of those concerned in the attack on the Russian Ambassador. By special act of Parliament also, declaration was made, "as authentic as possible, of the just horror" which British subjects in general had "against this violent insult"—to employ the words later used by the Queen—"and all the acts and proceedings which relate to the arrest of the person of Your Imperial Majesty's Ambassador are annulled and razed out of the registers of our courts of justice, and those who had a share therein are branded as infamous criminals and obnoxious to the laws which were then in force. And if any person hereafter durst commit the like offense, or any ways violate the privileges of ambassadors and other foreign ministers, they will be liable to the most severe penalties and punishments which the arbitrary power of the judges shall think fit to inflict upon them, and to which no bounds are given in this new act. So that all insults of this nature will be prevented for the future, and the security which all princes' ministers ought to enjoy will be firmly established and preserved by this famous law."



All these efforts at pacification were duly communicated to M. Mattueof, with many expressions of regret and indignation at the outrage and many assurances of zealous regard for the honor of Russia and her ambassador. Representations were made also directly to Peter the Great: special instructions had been dispatched to Lord Whitworth, English Ambassador at Moscow, immediately after the outrage, and Queen Anne with her own hand had addressed a letter to His Tsarish Majesty.

Russia, however, remained firm in her demand for a reparation as extraordinary as had been the insult, — “that a capital punishment, according to the rigor of the law, . . . or at least such an one as is adequate to the nature of the affront,” be inflicted on all “the accomplices of the crime;” — and in the course of the correspondence cited as a case in point the extra-legal action taken by Venice a short time before in summarily committing to pillory and galleys certain of her own customs officials against whom the English Ambassador, Lord Manchester, indirectly had cause for complaint. In both these cases, Russia insisted, it was not local law, but the more sacred laws of nations that had been violated, — a consideration making inapplicable the usual legal processes, and calling for action more sudden and drastic. The diplomatic corps of the foreign ministers then in London sided with the Russian Ambassador and before its enactment formally protested against the proposed Parliamentary provision touching the privileges of ambassadors, in that it rested those privileges not on the immemorial rights of nations, but, tacitly, on local law merely, which subsequent acts of Parliament might alter or even annul.

The proposed bill was modified in this particular,<sup>1</sup> but those who

<sup>1</sup> The preamble of the act as it finally became law, after rehearsing the indignities to which the Russian Ambassador was subjected, contained, in accordance with the memorial presented by the foreign ministers, the following clauses defining the incident as “contrary to the law of nations, and in prejudice to the rights and privileges which ambassadors and other public ministers, authorized and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable.” The act was in its inception, therefore, modified so as to make it clearly an act declaratory of the law of nations. It was so understood by Queen Anne, who, in her letter of August, 1709, to the Tsar, speaks of it as “a declaration as authentic as possible of the just horror which our subjects in general have against this violent insult;” and later refers to those responsible for the incident as obnoxious “to the laws which were then in force.” The same view was taken of it by the Russian

had been found guilty in the attack upon the ambassador were not punished. The laws were acknowledged to be inadequate to the situation. Another method was hit upon, therefore, for affording Russia that undoubted satisfaction which for many months she had been so persistently demanding. In the six weeks' jubilee following the Tsar's return from his victorious campaign against Charles XII, Her Majesty's Ambassador at the Russian Court, specially invested for this single mission with extraordinary and plenipotentiary powers, apologized in open audience in the Queen's name to Peter the Great. Even his words of address were significant.<sup>1</sup> "Most High and Most Potent Emperor!" he began; and continuing after a brief rehearsal of the case, he testified to "the sorrow and the just and high abhorrence" which the Queen had for "that rash deed" against the Russian Ambassador. He begged excuse for the defect and insufficiency of the ancient British Constitution, most instantly desiring that, "entirely putting the same in oblivion," His Tsarish Majesty might "again generously continue" his high affection to the Queen and to her subjects.

At the conclusion of this address, which was spoken in English, translations in German and Russian were read in a loud voice. The ambassador then placed in the Emperor's hands an autograph letter from the Queen, which the Emperor entrusted to his Grand Chancellor before making a brief speech of acknowledgment.<sup>2</sup>

Ambassador, who could not conceive, therefore, how it contributed "in any wise to the satisfaction . . . in debate; because the sacred characters of ambassadors have been in all times accounted inviolable among all the powers before that declaration, which being but a particular law," could "only serve to justify the honor" of the British nation. In 1737, also, when *Barbuit's* case came before Lord Talbot for decision, the act was defined by him as "only declaratory of the ancient universal *jus gentium*" (see § 2, p. 20); Lord Mansfield, in 1761, in the case of *Triquet et al. v. Bath*, quoted Lord Talbot as declaring a clear opinion "That the law of nations, in its full extent, was part of the law of England. . . . That the Act of Parliament was declaratory; and occasioned by a particular incident" (see *Triquet v. Bath* [1761], p. xxxi); and Lord Campbell, in 1851, in rendering an opinion in the case of *De Haber v. Queen of Portugal*, said of the statute that it "has always been said to be merely declaratory of the law of nations, recognized and enforced as such by our municipal law." (*Queen's Bench Reports*, new series, vol. xvii [London, 1855], p. 207.)

<sup>1</sup> De Martens states that it was on this occasion (February, 1710) that Great Britain first gave the title of *Emperor* to the Tsar. The word was used, however, in the act of Parliament passed in connection with this case, April 21, 1709 (*vide supra*).

<sup>2</sup> Blackstone records that a copy of the Act of Parliament, "elegantly engrossed and illuminated," was at this same time presented to the Tsar. (*Commentaries*

It was on February 9, 1710, at a conference of the Emperor's ministers presided over by this same Grand Chancellor, that suitable conclusions to the whole matter were formulated. It was arranged that M. Mattueof, then Ambassador at The Hague, should advise Queen Anne of what had taken place at the Russian Court and of the gracious clemency of the Tsar and of his desire that Her Majesty would pardon the offenders. It was requested, however, that Her Majesty herself write an appropriate letter to M. Mattueof, upon receipt of which — so the arrangement ran — M. Mattueof would in due form ask for his letters of recall, which he had not obtained in his haste to leave England some eighteen months before. The ambassador, further, was to be reimbursed for all the costs and damages which he had been "obliged to be at, and to suffer, on account of the said affront." And finally, when all these preliminaries had been effected, it was agreed that Peter the Great should acquaint the Queen that he was "content with the foresaid satisfaction."

(*The History of the Reign of Queen Anne, digested into Annals*, year the seventh [London, 1709], pp. 233-42, 326-36; year the eighth [London, 1710], pp. 141-58; Charles de Martens: *Causes Célèbres du Droit des Gens* [Leipsic and Paris, 1827], vol. 1, pp. 47-74.)

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### THE CASE OF GALLATIN'S COACHMAN (1827)

DURING Mr. Gallatin's mission at London, in 1827, an incident occurred involving a question of diplomatic privileges, which led to an exposition of the British views on the rights of embassy. His coachman was arrested in his stable on a charge of assault, on a warrant from a magistrate. The subject having been informally brought to the notice of the Foreign Office, a communication was addressed to the secretary of the American Legation by the Under-Secretary of State, Mr. Backhouse, May 18, 1827, in which he informed Mr. Lawrence of the result of a reference made, by order of Lord Dudley, to the law officers of the Crown. In it it is said that "the statute of the 7th Anne, chap. 12, has [London, 1857], vol. 1, p. 249.) In the *Annals of Queen Anne* (vol. VII, p. 327) it is noted that the Commons "ordered the bill to be engrossed."

been considered in all but the penal parts of it nothing more than a declaration of the law of nations; and it is held that neither that law, nor any construction that can properly be put upon the statute, extends to protect the mere servants of ambassadors from arrest upon criminal charges, although the ambassador himself, and probably those who may be named in his mission are, by the best opinions, though not by the uniform practice of this country, exempt from every sort of prosecution, criminal and civil. His lordship will take care that the magistrates are apprised, through the proper channel, of the disapprobation of His Majesty's Government of the mode in which the warrant was executed in the present instance, and are further informed of the expectation of His Majesty's Government that, whenever the servant of a foreign minister is charged with a misdemeanor, the magistrate shall take proper measures for apprising the minister, either by personal communication with him or through the foreign office, of the fact of a warrant being issued, before any attempt is made to execute it, in order that the minister's convenience may be consulted as to the time and manner in which such warrant shall be put in execution."

An official character was given to the preceding communication by a note from Earl Dudley, Secretary of State for Foreign Affairs, June 2, 1827, in which he says that it is only necessary for him to "confirm the statement contained in the private note of Mr. Backhouse, referred to by Mr. Gallatin, as to the law and practice of this country upon the questions of privilege arising out of the arrest of Mr. Gallatin's coachman, and to supply an omission in that statement, with respect to the question of the supposed inviolability of the premises occupied by a foreign minister. He is not aware of any instance, since the abolition of sanctuary in England, where it has been held that the premises occupied by an ambassador are entitled to such a privilege by the law of nations."

He adds that courtesy requires that their houses should not be entered without permission being first solicited in cases where no urgent necessity presses for the immediate capture of an offender.

(Moore: *Digest of International Law*, vol. iv, pp. 656-57; Wheaton: *Elements of International Law* [2d annotated edition by Lawrence, London, 1863], pp. 1006-07.)

## SOULÉ'S CASE (1854)

IN October, 1854, Mr. Soulé, American Minister at Madrid, who had been attending the Ostend Conference, arrived at Calais, in France, intending to return to his post by way of Paris. On his arrival at Calais he was provisionally stopped under an order of the Minister of the Interior that he should not be allowed to "penetrate into France" without the knowledge of the government. Mr. Soulé, who was a native of France and a naturalized citizen of the United States, was currently reported to have made speeches adverse to the government of Louis Napoleon and to have held communication with some of its adversaries. Furthermore, the American Minister, while at Madrid, had engaged the French Ambassador in a duel. On being stopped at Calais, Mr. Soulé straightway left France to return to his post by way of England and Portugal. Mr. Mason, American Minister at Paris, on hearing of the action of the authorities at Calais, immediately addressed a protest to the French Government, not only against the interruption of Mr. Soulé's journey, but also against the refusal, as he supposed, of the French Government to permit Mr. Soulé to pass through that country. M. Drouyn de l'Huys, then Minister of Foreign Affairs, replied that the government of the Emperor had "not wished . . . to prevent an envoy of the United States crossing French territory to go to his post in order to acquit himself of the commission with which he was charged by his government," but that "between this simple passage and the sojourn of a foreigner, whose antecedents have awakened, I regret to say, the attention of the authorities invested with the duty of securing the public order of the country, there exists a difference, which the Minister of the Interior had to appreciate;" that "if Mr. Soulé was going immediately and directly to Madrid the route of France was open to him;" that if, on the contrary, he "intended to go to Paris with a view of tarrying there, that privilege was not accorded to him. It was, therefore, necessary to consult him as to his intentions, and it was he who did not give the time for doing this." (Modified extract from Moore: *Digest of International Law*, vol. iv, pp. 557-58.)

In his second annual message of December 4, 1854, President Pierce, after referring to the traditional friendship with France and alluding to the settlement of the case of the French Consul at San Francisco,<sup>1</sup> continued: "Subsequent misunderstanding arose on the subject of the French Government having, as it appeared, abruptly excluded the American Minister to Spain from passing through France on his way from London to Madrid. But that government has unequivocally disavowed any design to deny the right of transit to the Minister of the United States, and after explanations to this effect he has resumed his journey and actually returned through France to Spain." (*Messages and Papers of the Presidents 1789-1897*, compiled by James D. Richardson [Washington, 1897], vol. v, p. 278.)

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#### THE LORD SACKVILLE WEST INCIDENT (1888)

ON September 12, 1888, Lord Sackville West, British Minister to the United States, while at Beverly, Massachusetts, received a letter from Pomona, California, from one who signed himself "Charles F. Murchison," stating that he was a naturalized American of English birth; that he, as well as hundreds of other recently naturalized Americans from England, was in a quandary as to how to cast his vote at the approaching presidential election. President Cleveland, he said, apparently had always been very friendly and favorable towards Great Britain, but his recent message to Congress, following close upon the rejection of the fisheries treaty, had alarmed him to such an extent that he sought advice from one who would know just how these many votes might be cast to the greatest advantage of the mother country, which was still dearest to them.

Although, as Lord Sackville afterward admitted, the writer of this letter was wholly unknown to him, and although it was evident that any advice sent, even though his correspondent had agreed to keep the source of his knowledge a secret, was intended to be used broadcast to influence votes for or against Cleveland, Lord Sackville answered the letter on the following day: "You

<sup>1</sup> See *Dillon's Case*, *post*, p. 31.

are probably aware," he said, "that any political party which openly favored the mother country at the present moment would lose popularity, and that the party in power is fully aware of this fact;" and in respect to the "questions with Canada, which have been unfortunately reopened since the rejection of the [fisheries] treaty by the Republican majority in the Senate, and by the President's message to which you allude, allowance must therefore be made for the political situation as regards the presidential election." In his letter he inclosed a clipping from the *New York Times* which advised electors to vote for Mr. Cleveland's reelection.

As Secretary of State Bayard said in his note of January 30, 1889, "Lord Sackville was thus applied to in unmistakable terms to interfere in the political affairs of the United States, and at a time of intense public feeling, when issues of deep moment were awaiting popular decision."

The letter was a political trick intended to embarrass the Cleveland Administration and discredit it in the eyes of thousands of voters, especially the Irish, and the correspondence was made public in the last days of the campaign, about October 25th. Lord Sackville was at once sought out by the various newspapers, and he readily confirmed the authenticity of the letters, making no effort to modify the impugnments of the action of the government which he had at least tacitly agreed to in his answer, in some cases emphasizing them.

Secretary Bayard at once expressed to Lord Salisbury, British Secretary for Foreign Affairs, the desire of this government that Lord Sackville be recalled. Lord Salisbury declined to act until in receipt of the precise language of Lord Sackville and his explanation. Without waiting further, the President authorized Secretary Bayard to inform Lord Sackville that he had become convinced that it would be incompatible with the best interests, and detrimental to the good relations, of both governments that he should any longer hold his official position in the United States, and he further authorized the Secretary to send the Minister his passports.

This action by the United States Government raised a storm of protest from the British press, although it had, up to the

time of the actual dismissal, been unanimous in its condemnation of interference in the domestic affairs of our government, and had insistently pointed out that Lord Sackville could no longer be of any service to Great Britain in America.

The position of the Government of the United States was stated by Mr. Phelps, United States Minister to Great Britain, in his note of December 4 to Lord Salisbury: "In asking from Her Majesty's Government the recall or withdrawal of its minister, upon a representation of the general purport of the letter and statements above mentioned, the Government of the United States assumed that such request would be sufficient for that purpose, whatever consideration the reasons for it might afterwards demand or receive. It was believed that the acceptance or retention of a minister was a question solely to be determined, either with or without the assignment of reasons, by the government to which he was accredited."-/

Replying to this, the Marquis of Salisbury observed:

"Her Majesty's Government are unable to assent to the view of international usage which you have here laid down. It is, of course, open to any government, on its own responsibility, suddenly to terminate its diplomatic relations with any other state or with any particular minister of any other state. But it has no claim to demand that the other state shall make itself the instrument of that proceeding, or concur in it, unless that state is satisfied by reasons, duly produced, of the justice of the grounds on which the demand is made.

"The principles which govern international relations on this subject appear to Her Majesty's Government to have been accurately laid down by Lord Palmerston on the occasion of Sir Henry Bulwer's sudden dismissal from the court of Madrid in 1848:

"The Duke of Sotomayor, in treating of that matter, seems to argue as if every government was entitled to obtain the recall of any foreign minister whenever, for reasons of its own, it might wish that he should be removed; but this is a doctrine to which I can by no means assent.

"It is quite true, as said by the Duke of Sotomayor, that the law of nations and international usage may permit a



government to make such a demand; but the law of nations and international usage also entitle the government to whom such a request may be preferred to decline to comply with it. I do not mean to say that if a foreign government is able to state to the Government of Her Majesty grave and weighty reasons why the British Minister accredited to such government should be removed, Her Majesty's Government would not feel it to be their duty to take such representations into their serious consideration, and to weigh them with all the attention which they might deserve. But it must rest with the British Government in such a case to determine whether there is or is not any just cause of complaint against the British diplomatic agent, and whether the dignity and interests of Great Britain would be best consulted by withdrawing him, or by maintaining him at his post.'"

In discussing this position of the British Foreign Secretary and the case of Sir Henry Bulwer, Secretary Bayard said:

"The case of Lord Sackville is wholly dissimilar. In the former the objection of Spain was to the action of Lord Palmerston and presumptively of the ministry of Great Britain, of which Sir Henry Bulwer was but the channel of communication, and throughout the entire transaction Sir Henry Bulwer received the entire approval of his lordship.

"The offense of Lord Sackville consisted in personal misconduct, wholly inconsistent with his official duty and relations, of which no suggestion of approval by his government has yet been intimated.

"Thus the present issue is not whether it is requisite that a sovereign asking the recall of a foreign minister should give the reasons for the application, but whether, when, as in the present case, such recall has been asked on the ground of interference in the politics of the country to which he is accredited, the question of the culpability or degree of such interference is to be left not to the decision of the offended sovereign, but to the determination of the sovereign by whom the offending minister was accredited. It is not understood how the latter view can be held by Her Majesty's Government to be a principle of the law of nations,

for it would be equivalent to saying that, by such law, that government is entitled to determine how far it will interfere in the politics of foreign states, and what degree of interference by its ministers in the internal affairs of such states it may see proper to sustain. It would be far better to suspend diplomatic relations entirely than to continue them on the basis of such a right of interference in the domestic politics of other states as would appear to be assumed, and under which, if admitted, the independence and dignity of the injured nation would perish.

“What I deem to be the true international rule on this subject I find stated under the high authority of Calvo:

“‘When the government near which a diplomatic agent resides thinks fit to dismiss him for conduct considered improper, it is customary to notify the government which accredited him that its representative is no longer acceptable, and to ask for his recall. If the offense committed by the agent is of a grave character, he may be dismissed without waiting the recall of his own government. The government which asks for the recall may or may not, at its pleasure, communicate the reasons on which it bases its request; but such an explanation cannot be required. It is sufficient that the representative is no longer acceptable. In this case international courtesy prescribes his immediate recall; and if, notwithstanding, the other government does not comply with the request, the dismissal of the agent follows as a necessary consequence, it is effected by a simple notification and the sending of his passport. The dismissal of a diplomatic agent for improper conduct, either in his individual capacity or in the discharge of his official duties, is not an act of discourtesy or hostility toward the government which accredited him, and, consequently, cannot be a reason for declaring war.’ (*Int. Law* [4th ed., 1888], vol. 3, p. 213.)

“The point of time at which this exclusive discretion is to be exercised — whether before the departure of the envoy for his post, or at his entrance upon his duties, or at any period dur-

ing their continuance — would not apparently affect the claim put forward by the Marquis of Salisbury.

"Under the rule adopted by him the receiving government must take whoever may be sent; and, in case by misbehavior the envoy should render himself unacceptable, its rights are to be restricted to a submission of the reasons, which, if 'grave and weighty,' would be taken into serious consideration and weighed by Her Majesty's Government 'with all the attention they might deserve.'

"To accept such a proposition as a rule of international intercourse would be absolutely inconsistent with national independence. I have, therefore, forbore to cite from Calvo the numerous cases from which he deduces the rule laid down by him.

"An envoy is intended to be a confidential intermediary between two governments professing friendly relations, and in reliance upon his good faith the best assurance of continued amity and good understanding will be found.

"It cannot, therefore, be justly regarded as a cause of international offense to request the recall of an envoy whenever it is discovered that his conduct has been such as to unsettle the confidence of the receiving government; nor for that government to dismiss him whenever in its judgment circumstances have arisen, owing to his misconduct, which endanger its own safety and welfare or tend to jeopardize the good relations of the two governments.

"I renew my expressions of sincere regret that what Lord Salisbury has correctly termed a 'personal incident' should have been thought by Her Majesty's Government in any degree to qualify the harmony of intercourse between two nations, for whose amicable relations none can be more sincerely desirous than the President and those who, together with him, are charged with the administration of the affairs of the Government and people of the United States.<sup>1</sup>

<sup>1</sup> In retaliation the British Government recalled the other members of the British Mission, leaving the legation and archives in the custody of a clerk. It was suggested that he might properly be designated as a *chargé des affaires*, to distinguish the case of a *chargé d'affaires ad interim*, as, for example, when a secretary of legation is left temporarily in charge.

"You are authorized to communicate a copy of this paper to Her Majesty's Government.

"I am, sir, your obedient servant,

"T. F. BAYARD."

(*Foreign Relations of the United States, 1888*, part II, pp. 1667-1729, especially pp. 1667-69; 1672, 1706, 1710, 1720-24.)

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### DUKE OF RIPPERDA'S CASE (1726)

IN 1726 the famous Duke of Ripperda, Minister of Finance and Foreign Affairs to Philip V of Spain, becoming apprehensive as to his security, sought asylum in the house of the British Ambassador at Madrid. It appears that Ripperda came uninvited to the British Embassy, after having been refused asylum at the Dutch, and that he was permitted to remain at the former only after assuring the British Ambassador that he was not in disgrace (he had been dismissed from office on a pension) or charged with crime. Subsequently the ambassador had an audience of the King and was assured that the duke might remain in the embassy, it being understood that he was not to be permitted to escape and that some soldiers would be placed about the embassy as a precaution against any attempts in that direction. The Spanish Government, however, subsequently becoming alarmed at the discovery that the duke had taken with him important papers, submitted to the Council of Castile the question whether he might not be seized. The Council of Castile answered in the affirmative, holding that it would "operate to the subversion and utter ruin [of sovereigns] if persons who had been entrusted with the finances, the power and the secrets of the state, were, when guilty of violating the duties of their office, allowed to take shelter under a privilege which had been granted to the houses of ambassadors in favor of only ordinary offenders."

In conformity with this view, the Spanish Government sent officers to seize the duke. This was done without previously communicating to the ambassador the resolution of the Council of Castile and demanding Ripperda's surrender. The ambassador submitted to avoid disturbance. The relations between England

and Spain were already exceedingly strained, and the seizure of Ripperda, though not the cause of the subsequent hostilities between the two countries, was resented in England. The burden, however, of the British Government's complaint was the summary and forcible termination, without notice, of the asylum to which the King had consented, the Duke of Newcastle, then Secretary of State, expressly saying that, without deciding whether the ambassador had or had not the right to protect Ripperda, an opportunity should under the circumstances have been afforded for his surrender before resort was had to an act of force.

(Taken textually from Moore: *Digest of International Law*, vol. II, pp. 765-66.)

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#### EXPULSION OF THE SECRETARY OF THE NUNCIATURE AT PARIS (1906)

IN the year 1904 relations were broken off between France and the Holy See. In the month of July of that year the French Government returned his passports to the nuncio, Mgr. Lorenzelli, and recalled the French Ambassador from the Vatican. Subsequently only a secretary of the embassy remained at Rome in the former embassy of France to guard its archives. Similarly an auditor of the nunciature, Mgr. Montagnini, was entrusted with the like office at Paris at the residence in the Rue de l'Elysée formerly inhabited by the nuncio. The French Government looked upon the continued presence of this secretary in Paris as dangerous after the putting into effect of the law of December 9, 1905, providing for the separation of Church and State. In obedience to the Pope's orders, the Catholic clergy of France did not form the religious organizations provided for by law. They were not even willing to consider their religious gatherings as public meetings and to give the notice required by the law of June 30, 1881, in accordance with the decision of M. Briand, Minister of Education and Religious Affairs, in his circular of December 1, 1906. This attitude disturbed the French Government. They believed that the Italian prelate was an intermediary between the Pope and members of the clergy, that he had given them instructions to resist the French law, and that his expulsion

was necessary. Consequently, on December 11, 1906, at six o'clock in the morning the chief officer of the police entered the house situated at No. 10 Rue de l'Elysée where, since the nuncio's departure, Mgr. Montagnini had continued to reside. The prelate would seem to have been placed in solitary confinement; at any rate, isolated as completely as possible from communication with the outside world. From six o'clock in the morning till five o'clock at night the place was carefully guarded, even personal and intimate friends of the prelate being denied admittance. During this time search was made among the prelate's papers. In the evening, after a rapid sorting, the most important of these papers were carried to the record office of the Palace of Justice. As for Mgr. Montagnini, he was conducted under the escort of special officers to the railway station of Lyon and thence to the frontier without being able to communicate with any one until his departure from France.

Such were the facts. They resulted in a protest (December 21) on the part of the Holy See, addressed to its representatives with various foreign governments. The opposition in France, both in the press and in the Chamber of Deputies, did not fail to point out the brutality of the procedure.

(Translation. *Revue Générale de Droit International Public*, [1907], vol. xiv, pp. 176-77.)

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## § 2. CONSULS

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### CONSUL PRIEST'S CASE (1855)

IN instructions dated May 11, 1855, to the American Minister to Nicaragua, Secretary Marcy said: "The right of the Nicaraguan Government to refuse an exequatur to Mr. Priest [who had been appointed United States Consul at San Juan del Sur] cannot be denied. If, as is intimated, the only cause assigned for their hesitation was the publication of a private letter of that gentleman which was deemed objectionable, he may regret this as a misfortune, but, if he shall not ultimately receive the exe-

quatur, we could not consider it as an injury of which it would be advisable to complain."

(Moore: *Digest of International Law*, vol. v, p. 28.)

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### BARBUIT'S CASE (1737)

BARBUIT had a commission, as agent of commerce from the King of Prussia in Great Britain, in the year 1717, which was accepted here by the Lords Justices when the King was abroad. After the late King's demise his commission was not renewed until 1735, and then it was, and allowed in a proper manner; but with the recital of the powers given him in the commission, and allowing him as such. These commissions were directed generally to all the persons whom the same should concern and not to the King; and his business described in the commissions was, to do and execute what His Prussian Majesty should think fit to order with regard to his subjects trading in Great Britain; to present letters, memorials and instruments concerning trade to such persons, and at such places, as should be convenient, and to receive resolutions thereon; and thereby His Prussian Majesty required all persons to receive writings from his hands, and give him aid and assistance. Barbuitt lived here near twenty years, and exercised the trade of a tallow-chandler, and claimed the privilege of an ambassador or foreign minister, to be free from arrests. After hearing counsel on this point,

*Lord Chancellor*: "A bill was filed in this court against the defendant in 1725, upon which he exhibited his cross-bill, styling himself merchant. On the hearing of these causes the cross-bill was dismissed; and in the other, an account decreed against the defendant. The account being passed before the master, the defendant took exceptions to the master's report, which were overruled; and then the defendant was taken upon an attachment for non-payment, etc. And now, ten years after the commencement of the suit, he insists he is a public minister, and therefore all the proceedings against him null and void. Though this is a very unfavorable case, yet if the defendant is truly a public minister, I think he may now insist upon it; for the privilege of a public

minister is to have his person sacred and free from arrests, not on his own account, but on the account of those he represents, and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the prince by whom an ambassador is sent, and for sake of the business he is to do, it is impossible that he can renounce such privilege and protection: for, by his being thrown into prison the business must inevitably suffer. The question is, whether the defendant is such a person as 7 *Anne, cap. 10*, [12], describes, which is only declaratory of the ancient universal *jus gentium*; the words of the statute are, *ambassadors or other public ministers*, and the exception of persons trading relates only to their servants, the Parliament never imagining that the ministers themselves would trade. I do not think the words *ambassadors*, or *other public ministers*, are synonymous. I think that the word *ambassadors* in the act of Parliament, was intended to signify ministers sent upon extraordinary occasions, which are commonly called *ambassadors extraordinary*; and *public ministers* in the act take in all others who constantly reside here; and both are entitled to these privileges. The question is, whether the defendant is within the latter words. It has been objected that he is not a public minister, because he brings no credentials to the King. Now, although it be true that this is the most common form, yet it would be carrying it too far to say that these credentials are absolutely necessary; because all nations have not the same forms of appointment. It has been said, that to make him a public minister he must be employed about state affairs. In which case, if state affairs are used in opposition to commerce, it is wrong; but if only to signify the business between nation and nation the proposition is right: for, trade is a matter of state, and of a public nature, and consequently a proper subject for the employment of an ambassador. In treaties of commerce those employed are as much public ministers as any others; and the reason for their protection holds as strong: and it is of no weight with me that the defendant was not to concern himself about other matters of state, if he was authorized as a public minister to transact matters of trade. It is not neces-



sary that a minister's commission should be general to entitle him to protection; but it is enough that he is to transact any one particular thing in that capacity, as every ambassador extraordinary is; or to remove some particular difficulties, which might otherwise occasion war. But what creates my difficulty is, that I do not think he is intrusted to transact affairs between the two crowns: the commission is, to assist His Prussian Majesty's subjects here in their commerce; and so is the allowance. Now, this gives him no authority to intermeddle with the affairs of the King: which makes his employment to be in the nature of a consul. And although he is called only an agent of commerce, I do not think the name alters the case. Indeed, there are some circumstances that put him below a consul; for, he wants the power of judicature, which is commonly given to consuls. Also their commission is usually directed to the prince of the country; which is not the present case: but at most he is only a consul.

"It is the opinion of Barbeyrac, Wicquefort, and others, that a consul is not entitled to the *jus gentium* belonging to ambassadors.

"And as there is no authority to consider the defendant in any other view than as a consul, unless I can be satisfied that those acting in that capacity are entitled to the *jus gentium*, I cannot discharge him."<sup>1</sup>

*Note:* The person was after discharged by the Secretary's Office, satisfying the creditors.

(Taken textually with the reporter's statement from Forrester:

<sup>1</sup> In the discussion of this case the court seems to have determined, that a person residing in this country in the capacity of foreign minister, cannot, by any act or acts of his own, waive that privilege of protection which the law of nations has annexed to a situation so important. That a foreign minister, being or becoming a trader, does not thereby lose, or forfeit the privilege personally annexed to him; and therefore, the only reason why the court in the present instance did not think the defendant entitled to the protection which he claimed, was, that the employment which he was invested with, could at most be considered only as the same with, or equal to that of consul, which according to the best writers upon the subject, was not entitled to the *jus gentium*, or privilege belonging to ambassadors or ministers who are entrusted to transact matters of state or other affairs between two nations. That the law of nations (which in its fullest extent was and formed part of the law of England) was the rule of decision in cases of this kind; and that the act of Parliament was declaratory of it, and occasioned by a particular incident. [Note of the original report.]

*Cases in Equity during the time of the late Lord Chancellor Talbot* [3d ed., Dublin, 1793], pp. 280-83.)

### CONSUL WEILE'S CLAIM

THE international commission organized at Lima, Peru, in conformity with the Treaty of December 4, 1868, between the United States and Peru, settled, on the principle of conciliation without recourse to the umpires,<sup>1</sup> a number of diplomatic claims, amongst which was that of Charles Weile for wrongful arrest and imprisonment. Weile, while United States Consul at Tumbes, interfered to aid or protect a Peruvian woman who was fighting with her husband, and, as Peru alleged, dealt the husband a nearly fatal blow with his cane. For this act Weile was arrested and imprisoned, but he escaped before his trial was finished, and fled the country. It was alleged on the part of the United States that the wound on the husband's head was inflicted by the wife; that Weile's arrest was illegal, and without a warrant, and that the consular office was broken into in order to effect it. The Peruvian Commissioner was opposed to awarding a large sum, though he was willing to allow something. The United States Commissioner "insisted on the importance of giving a decision which would, by the magnitude of the award, show the local authorities how wrong it is for them to act in a hasty manner when the liberty and honor of the consul of a friendly power are concerned."

The amount demanded was \$46,279.62 and the award as it appeared in the report of Mr. Vidal was \$32,407.40.

(Almost a textual extract from Moore: *International Arbitrations*, vol. II, pp. 1639, 1641, 1646, 1653.)

### THE PRITCHARD AFFAIR (1844)

ON September 9, 1842, the Island of Tahiti, at the request of, and under the conditions specified by, its Queen Pomare, became a

<sup>1</sup> According to the terms of the treaty it was provided that if the contracting parties should not be able to agree on the name of an umpire they should each name

French protectorate. (*Correspondence relative to Tahiti*, pp. 8-18, *Parliamentary Papers* [1843], vol. LXL.) "Vice-Admiral Dupetit Thouars, who arrived in the Bay of Papeete on the 1st of November [1843] to carry into execution the Treaty of the 9th of September, 1842, which the King had ratified, deemed it his duty not to adhere to the stipulations of that treaty, but to take possession of the island." (*London Times*, February 27, 1844, 2d ed., and February 28, 1844, quoting the *Moniteur*, the official organ of the French Government.) Whereupon Mr. Pritchard, the English Consul at Tahiti, "immediately<sup>1</sup> hauled down his flag, and gave an official intimation or notice to the authorities that he was no longer Her Britannic Majesty's Consul there—that the Queen having been dethroned, he had no longer any official character."<sup>2</sup> (Statement of the Earl of Aberdeen, Secretary for Foreign Affairs, in the House of Lords, August 1, 1844; Hansard: *Parliamentary Debates* [London, 1844, 3d series], vol. LXXVI, p. 1643.)

Mr. Pritchard, whom the *London Times* (July 30, 1844) designates as undoubtedly "an indiscreet, hot-headed man," and who certainly in February or March of the same year interfered more actively in the fortunes of Queen Pomare than was considered proper by the British Foreign Office,<sup>3</sup> "constantly endeavored," according to a statement of the French Minister for Foreign Affairs on August 29, 1844, from "the month of February, 1843, up to the month of March, 1844, . . . by all sorts of acts and prac-

a person of a third nation, and that in each and every case in which they might differ in opinion as to the decision which they ought to give, it should be determined by lot which of the two persons so named should be umpire in that particular case.

<sup>1</sup> The *Journal des Débats* says that this measure was taken in the month of December. (*London Times*, August 6, 1844.)

<sup>2</sup> However extraordinary and unjustifiable it may have been, Mr. Pritchard's conduct in hauling down his consular flag and notifying the authorities that he was no longer consul was patently intended to be an emphatic protest—official in so far as he was able to make it—against the French action. Hence it was all the more incumbent upon the French authorities in this delicate situation to observe toward him the full measure of respect due to the consular representative of a friendly power. They must have known that an official is unable to divest himself of a public charge at will. In plain language, Pritchard's action amounted only to a declaration that the French action made it impossible for him to continue to fulfill his office. In the presence of a conciliatory disposition on the part of the two governments concerned, Pritchard's action was seized upon to minimize instead of aggravate the extent of the outrage.

<sup>3</sup> See *Correspondence relative to the Society Islands*, pp. 1, 3, 8, 9, *Parliamentary Papers* [1844], vol. LI.

tices to impede, disturb, and destroy the establishment of the French at Tahiti, the administration of justice, the exercise of authority by the French agents, and their relations with the natives."<sup>1</sup> (*Correspondence relating to the Removal of Mr. Pritchard, Parliamentary Papers* [1845], vol. LII.)

On March 2, Papeete, the capital of Tahiti, was declared by D'Aubigny, a French officer temporarily in charge, to be "in a state of siege," and that night a French sentinel was attacked. (*London Times*, July 30, 1844.) The subsequent action taken by D'Aubigny is told in his own declaration of March 3, which, according to the account of a British officer at Tahiti (*London Times*, July 30, 1844), was "placarded in French, English, and Tahitian on the different public places:"

"A French sentinel was attacked in the night of the 2d to the 3d of March.

"In reprisal, I have caused to be seized one Pritchard, the only daily mover and instigator of the disturbance of the natives. His property shall be answerable for all damage occasioned to our establishments by the insurgents; and if French blood is spilt, every drop shall recoil on his head.

"D'AUBIGNY,

"*Commandant Particular to the Society Islands.*

"PAPEETE, March 3."

(*London Times*, July 30, 1844.)

On the return of the French Governor to Papeete, as M. Guizot, French Minister for Foreign Affairs, afterwards informed the British representative at Paris, August 29, 1844, haste was made "to put an end to these vexatious proceedings by ordering the embarkation and departure of Mr. Pritchard." (*Correspondence relating to the Removal of Mr. Pritchard from Tahiti*, p. 5, *Parliamentary Papers* [1845], vol. LII.)

When, the last of July, the news of Mr. Pritchard's seizure reached England and France, a very tense situation immediately

<sup>1</sup> The Earl of Aberdeen, British Secretary for Foreign Affairs, in a letter of September 6, 1844, to the English Minister at Paris, wrote: "With respect to Mr. Pritchard, it is due to that gentleman to declare, that he has uniformly denied the truth of the allegations which have been brought against him, and has courted the strictest inquiry." No inquiry, however, was made at that time. (*Correspondence relating to the Removal of Mr. Pritchard from Tahiti, Parliamentary Papers* [1845], vol. LII.)

developed between the two countries. The indignation of England was met by an answering indignation in France that England should be so stirred, and a letter from the French correspondent of the London *Times* (printed August 6, 1844) declared: "It will be almost a miracle if the present ministry maintain itself and terminate this matter pacifically; and yet I am not without hope that they will be able to do both, although it is very easy to foresee the storm they will raise by acquiescing in any terms your government may propose."

A discussion of the matter immediately ensued between the British and French Governments, with the result that on August 29, 1844, M. Guizot, French Minister for Foreign Affairs, made to the English Government the following statement: That "the French authorities had legitimate grounds, and were in fact compelled to exercise their right to remove Mr. Pritchard from the territory of the island, where his presence and conduct fomented amongst the natives a constant resistance and sedition;" that this right belonged to the Government of the King "not only in virtue of the right common to all nations, but also according to the actual terms of the Treaty of the 9th of September, 1842, which established the French protectorate."<sup>1</sup> M. Guizot added, however: "With regard to certain circumstances which preceded the removal of Mr. Pritchard, especially the manner and the place of his temporary imprisonment, and the proclamation published with respect to him, at Papeete, on the 3d of March

<sup>1</sup> The Earl of Aberdeen, Secretary of State for Foreign Affairs, in his speech in the House of Lords on August 1, 1844, pointed out, however, that the act in question took place not during the French protectorate, but during the temporary and ill-advised possession of the island on the part of the French officers in command. The Earl of Aberdeen said: "It is undoubtedly true that a gross outrage has been committed against the person of a British subject. . . . But I wish to observe to the House that this proceeding has taken place, not only without the possible knowledge, or instruction, or participation of the French Government, but under a state of things which has been disavowed by them. It will be recollected that, in the month of September [*sic*] last, the French authorities in the Island of Tahiti dethroned the Queen, and took absolute possession of, and exercised the full rights of sovereignty over that island. . . . The proceeding was promptly disavowed by the French Government just about the time that the present transaction took place, in the month of March last. But during the intervening months, it is clear that a state of things existed that would account for certain acts which it would be impossible to anticipate under another and a more satisfactory state of things." (Hansard: *Parliamentary Debates* [London, 1844], 3d series, vol. LXXVI, p. 1643.)

last, the Government of the King regret them sincerely, and the necessity of such proceedings does not appear justified by the facts." (*Correspondence relating to the Removal of Mr. Pritchard from Tahiti, Parliamentary Papers* [1845], vol. LII.) A subsequent note of September 2 from M. Guizot to the French Minister at London added that, "in expressing to Her Britannic Majesty's Government their regret at, and disapproval of, certain circumstances which preceded the removal of Mr. Pritchard from the Island of Tahiti, the Government of the King are disposed to accord an equitable indemnity<sup>1</sup> to Mr. Pritchard in proportion to the losses and sufferings which those circumstances may have occasioned to him." (*Correspondence relating to the Removal of Mr. Pritchard from Tahiti, Parliamentary Papers* [1845], vol. LII.)

These overtures were accepted as entirely satisfactory by the British Government and were so announced in both Houses of Parliament on September 5, 1844. (*Correspondence relating to the Removal of Mr. Pritchard from Tahiti, Parliamentary Papers* [1845], vol. LII.)

(*Correspondence relative to Tahiti, in Parliamentary Papers* [1843], vol. LXI; *Correspondence relative to the Society Islands, in Parliamentary Papers* [1844], vol. LI; *Correspondence relating to the Removal of Mr. Pritchard from Tahiti, in Parliamentary Papers* [1845], vol. LII; Hansard: *Parliamentary Debates* [London, 1844], 3d series, vol. LXXVI; *London Times*, 1844; *The Annual Register*, 1844.)

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### THE CASE OF LEE JORTIN (1900)

THE civil court of Dieppe on January 22, 1900, gave the following decision in this case:

"Whereas action is brought against Lee Jortin, English Vice-Consul at Dieppe, in the police court at Dieppe on the complaint of Murphy, an English subject, for public slander and injury under articles 23, 29, 32, 33 of the law of July 29, 1881;

"Whereas Murphy alleges in his summons that on October 17, 1899, at 11:30 A.M. in the offices of the consulate at Dieppe,

<sup>1</sup> The indemnity agreed upon amounted to 25,000 francs. (Charles Calvo: *Le Droit International* [Paris, 1896], vol. III, p. 233.)

Lee Jortin insulted and slandered him in public in the presence of three newspaper men, saying to him in English: 'You are a drunkard, you know you are a drunkard;'

"Whereas, by way of reparation for the prejudice done his good name, Murphy sues Lee Jortin for the sum of ten thousand francs and asks furthermore that the judgment to be rendered in his favor be inserted in various newspapers;

"Whereas the attorney for the government considers that the court is not competent in the case; whereas Lee Jortin has adopted this objection of the incompetence of the court and claims, moreover, that he did not make the remarks specified in the summons;

"Whereas it appears from the investigation that on October 17 last, Messrs. Wilby, Strong and Cauway, English journalists, accompanied by Murphy, went to the English Vice-Consulate to make inquiries of Lee Jortin in regard to the circumstances of Murphy's arrest in the month of July preceding;

"Whereas Lee Jortin in this interview made it clear that, because of the possibility of his being directed to make an official investigation, it was proper that he should act with great reserve; nevertheless, on being reproached because he had not lent his assistance to Murphy, Lee Jortin, turning toward him, is alleged to have said: 'You were drunk that day; you know well enough you are a drunkard; we all have our moments of weakness; you have been seen repeatedly in Dieppe in a drunken condition' (testimony of Wilby and Strong);

"Whereas Mr. Walis, secretary of the consulate, affirms on the contrary that Lee Jortin did not make use of the expressions attributed to him by the witnesses, that he may perhaps have remarked to Murphy that he had the reputation of not behaving himself well at the club and of drinking too much, and he may have added in answer to Murphy's protest: 'Pardon me, but you surely know you are in the habit now and then of taking too much;'

"Whereas the alleged remarks in regard to which the witnesses are thus seen to disagree were made at the English Vice-Consulate in the office of the vice-consul;

"Whereas Lee Jortin was questioned as vice-consul in regard to

the reasons which had deterred him from giving assistance to one of his countrymen in difficulty with the French authorities;

"Whereas he was then fulfilling his office in stating the reasons which deterred him from intervening or which limited his intervention;

"Whereas consuls and vice-consuls do not in the absence of special treaty stipulations enjoy the privileges accorded diplomatic agents, more particularly the privilege of extraterritoriality and immunity from jurisdiction;

"Whereas they reside in France like any other foreigners subject to the police regulations for the public welfare, and therefore come under the jurisdiction of the French courts;

"Whereas, nevertheless, though this be granted, the action of consuls in their private capacity is not the same thing as their action in the capacity of consuls;

"Whereas even though it be true that consuls and vice-consuls are not diplomatic agents, they ought nevertheless to be considered as public officials of a foreign sovereign, who are entrusted by that sovereign with the duty of defending the interests of their countrymen before the local authorities, and who are invested so far as concerns these countrymen with a real authority (*magistrature*), in the free exercise of which they are insured by their letters of exequatur;

"Whereas, consequently and by virtue of their office, however it may differ from that of diplomatic ministers, they ought to enjoy a certain personal immunity so long as they keep within the limits of their official duties and the public welfare is not jeopardized;

"Whereas there is no question here of exemption from jurisdiction, but of an inherent immunity which arises from the very institution of consulates and which is governed by the laws of international courtesy;

"Whereas, in fact, it would be impossible for consuls to have the necessary freedom of action for the discharge of their duties if they could be subject to prosecution by their own countrymen before French courts for acts they had done or even merely for remarks which they had made in their official capacity;

"Whereas it was strictly in his official capacity as vice-consul



that Lee Jortin imparted to Murphy and the persons accompanying him the motives which led him to refuse his assistance;

"Whereas it is not the duty of the court to judge or examine the reasonableness of these motives or the more or less emphatic form in which he expressed himself;

"Whereas, in the case at issue, Lee Jortin can be held accountable for his acts and expressions to his own government only;

"Whereas it follows that it is not necessary to inquire into whether the remarks complained of are sufficiently proved or whether they contain elements which constitute the offenses of slander and injury either under the head of the materiality of the facts or of the publicity given them or of the intention;

"Whereas in consequence the court must declare itself simply and unconditionally without competence;

"On these grounds the court declares itself without competence and condemns Murphy, plaintiff in the suit, to pay the costs."

(Translation. *Journal de Droit International Privé* [1900], vol. XXVII, pp. 130-32.)

On appeal to the Court of Appeals of Rouen the decision of the court of Dieppe was affirmed, May 11, 1900, and Murphy was also condemned in costs for the appeal.

At the same time the Court of Appeals considered the appeal from another judgment of March 19, 1900, brought against Consul Jortin in the court of Dieppe by Murphy because of the alleged injury caused him by statements in a letter published in the *Times* and afterwards translated in a local newspaper of Dieppe. The court of Dieppe considered that Consul Jortin in writing the letter to the *Times* had not acted in his official capacity as a consul and consequently the court declared itself competent to consider the action, but in its judgment on the merits of the case the court found that Consul Jortin had acted without malice and in a manner reasonable under the circumstances. The case was dismissed and Murphy was condemned to pay the costs.

On Murphy's appeal from this decision the court of Rouen intimated that in its opinion Consul Jortin's act in writing to the *Times* did relate to his official position as consul and was under-

taken for the purpose of protecting the interests entrusted to his care. Furthermore, the court was of opinion that even if the view of the court of Dieppe should be accepted the decision was nevertheless correct in dismissing the action against Consul Jortin and Murphy was again condemned to pay the costs of this appeal.

(Condensed from the *Journal de Droit International Privé* [1900], vol. xxvii, pp. 958-64.)

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### CONSUL ROGERS'S CASE (1866)

MR. SEWARD, in an instruction to Mr. Kilpatrick, Chile, dated February 19, 1866, informed him of the revocation on the 12th inst. of the exequatur granted to Don Estaban Rogers on October 14, 1863, as Chilean Consul *ad interim* at New York. Mr. Kilpatrick was instructed, in communicating the fact to the Chilean Minister for Foreign Affairs, "to say that this measure was adopted for causes satisfactory to this government, and in defense of the dignity and honor of the United States," and to "add, at the same time, that should the Chilean Government see fit to appoint a successor to Mr. Rogers, if entirely unobjectionable, the usual exequatur will be granted to him."

On February 15 Mr. Asta Buruaga, the Chilean Minister at Washington, who had seen a notice of the revocation of the exequatur in the press, complained that he had not been advised either of the action taken or of the reasons for it, and intimated that it was inspired by false representations of Spanish agents as to the consul's violation of the neutrality laws.

Mr. Seward replied, February 16, that the action was taken "for causes satisfactory to this government, and in defense of the dignity and honor of the United States," and that General Kilpatrick had been instructed to say to the Chilean Government "that a new consul, if entirely unobjectionable, will be received by this government."

Mr. Asta Buruaga subsequently left at the Department of State, April 26, 1866, a communication on the subject, dated the 2d of that month, from the Chilean Minister of Foreign Affairs. In this communication Mr. Covarrubias said that Mr. Seward's

"laconic explanation," which was called forth by the minister's "timely and just observations," did not disclose the reason for the revocation of the exequatur. When, in 1859, Chile "was compelled, for good and powerful reasons, to cancel the exequatur of Mr. Trevitt, Consul of the United States at Valparaiso," she addressed without delay to the United States Minister explanations which were "spontaneous, clear, circumstantial, full, and satisfactory." She therefore looked with "double surprise and regret" upon the present case, in which she had "a right to expect at least that the international principle of reciprocity would have been consulted."

Mr. Seward, May 29, replied, in a note to Mr. Asta Bùruaga, that the President was not convinced that an error had been committed in the withdrawal of the exequatur or in the manner in which it was done. The consul's exequatur was summarily revoked "under full conviction on the part of this government that the complaints of his violation of the neutrality laws were sustained by presumptive proof, and that to allow him to continue to exercise consular functions while pursuing such unlawful practices would involve a necessity for explanations between the Government of Chile and that of the United States, which could in no case improve the friendship existing between them, and might, perhaps, result in producing a rupture of relations which would be prejudicial to both, and to the cause of all the American republics." It was, however, "an occasion of much regret" that a commercial agent of Chile "should have proved himself unworthy of the confidence reposed in him by the friendly Government of the United States."

(Taken textually from Moore: *Digest of International Law*, vol. v, pp. 22-23.)

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#### DILLON'S CASE (1854)

IN 1854 Mr. Dillon, then Consul of France at San Francisco, was brought into the United States District Court, then sitting, on an attachment for refusing to obey a subpoena *duces tecum* issued from that court to compel his attendance at a criminal trial then and there pending. Mr. Dillon protested against the

process on two grounds: (1) immunity from such process by international law; (2) immunity under the French-American treaty. The second point was merged in argument in the first, since it was agreed by counsel that the treaty privilege could not stand in the way of a party's constitutional right to meet the witness against him face to face, unless that privilege was in accordance with public international law.

When the attachment was served on Mr. Dillon, he hauled down his consular flag; and the case was taken up by the French Minister at Washington, as involving a gross disrespect to France. A long and animated controversy between Mr. Marcy, then Secretary of State, and the French Government ensued. The fact that an attachment had issued under which Mr. Dillon was brought into court was regarded by the French Government as not merely a contravention of the treaty, but an offense by international law; and it was argued that the disrespect was not purged by the subsequent discharge of Mr. Dillon from arrest. It was urged, also, that the fact that the subpoena contained the clause *duces tecum* involved a violation of the consular archives. Mr. Marcy, in a letter of September 11, 1854, to Mr. Mason, then minister at Paris, discusses these questions at great length. He maintains that the provision in the Federal Constitution giving defendants opportunity to meet witnesses produced against them face to face, overrides conflicting treaties, unless in cases where such treaties embody exceptions to this right recognized as such when the Constitution was framed. One of these exceptions relates to the case of diplomatic representatives. "As the law of evidence stood when the Constitution went into effect," says Mr. Marcy, "ambassadors and ministers could not be served with compulsory process to appear as witnesses, and the clause in the Constitution referred to did not give the defendant the right in criminal prosecutions to compel their attendance in court." This privilege, however, Mr. Marcy maintained, did not extend to consuls, and consuls, therefore, could only procure the privilege when given to them by treaty which, in criminal cases, was subject to the limitations of the Constitution of the United States. Mr. Marcy, however, finding that the French Government continued to regard the attachment, with the subpoena *duces*

*tecum*, as an attack on its honor, offered, in a letter to Mr. Mason, dated January 18, 1855, to compromise the matter by a salute to the French flag upon a French man-of-war, stopping at San Francisco.<sup>1</sup> Count de Sartiges, the French Minister at Washington, asked in addition that when the consular flag at San Francisco was rehoisted, it should receive a salute. This was declined by Mr. Marcy. In August, 1855, after a long and protracted controversy, the French Government agreed to accept as a sufficient satisfaction an expression of regret by the Government of the United States, coupled with the provision that "when a French national ship or squadron shall appear in the harbor of San Francisco the United States authorities there, military or naval, will salute the national flag borne by such ship or squadron with a national salute, at an hour to be specified and agreed on with the French naval commanding officer present, and the French ship or squadron whose flag is thus saluted will return the salute gun for gun."

<sup>1</sup> Whatever the correctness, from a constitutional point of view, of the opinions expressed by Marcy, by his action in agreeing to a salute of the French flag, he admitted the validity of the French contention. Although unwilling to denounce the valuable treaty with France, the United States was careful not to enter into any new treaties which contained any provision exempting consuls from giving testimony. Provided the local authorities refrain from serving subpoenas or attachments and appeal to the Federal Government, the latter should not have much difficulty in prevailing upon the consul to give his testimony. In a note of March 27, 1855, to the Portuguese Chargé d'Affaires (see Moore: *Digest of International Law*, vol. v, pp. 80-81), Secretary Marcy, referring to the above-mentioned Article II of the consular convention between the United States and France of February 23, 1853, made the following statement: "It is the duty of a consul, when invited to appear in court to give his testimony, to comply with the request unless *he is unable to do so*. This duty he violates, if he refuses without good and substantial excuse. Neither his official character, his disinclination, nor any slight personal inconvenience constitutes such an excuse. The pressure and importance of official duties requiring immediate performance may prevent his attendance in court, but such can very rarely be the case where the court sits at the place of his residence. It is not claimed that the court can entertain the question of the competency of his excuse for declining to comply with its invitation; but, where the Government of the United States has fair grounds to question the good faith with which the consul avails himself of the provision of the convention which exempts him from compulsory process, it has two modes of redress and it can take either at its option. It can appeal to the consul's government to inquire into the case in this respect, and to deal with him as it shall find his conduct deserves; or it can revoke his *exequatur*."

The constitutional aspects of Dillon's case and the discussion regarding the limits of the treaty-making power are not considered here, since they are properly classed as questions of the national or municipal law of the United States.

(Extracted and condensed from Wharton: *Digest of the International Law of the United States* [Washington, 1886], vol. 1, pp. 665-67.)

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### THE INCIDENT OF THE FRENCH CONSULATE AT FLORENCE (1887-88)

ON June 28, 1887, there died, at Florence, Hussein Pacha, an agent of long standing for the Bey of Tunis whose subject he was. The French Consul, M. de Laigue, advised the local authority of the death and, without encountering any opposition, affixed seals to the effects of which Hussein Pacha died possessed. The local authorities were informed of this fact, as appears from letters addressed under date of June 30 to the French Consul by the pretors of the first and second district at Florence, who excused themselves for not being able, by reason of the duties of their office, to be present at the affixing of the seals.

The effects and papers of the deceased were placed in the archives of the consulate. The French Consul believed that in so doing he was acting conformably to the Franco-Italian Consular Convention of 1862.

Several months passed. On October 29 and on November 2, 1887, the French Consul, at the request of M. Santillana, acting for the Bey of Tunis who had claim on the property, proceeded to break the seals, which had not been crossed with those of the local authorities. Then one M. El-melik came forward. He pretended to be a creditor of the deceased and to have the right, as such, to be present at the scrutiny of the papers of which Hussein Pacha died possessed.

El-melik was an Algerian Jew, who became French by virtue of the decree of October 24, 1870, rendered at Tours at the instance of M. Crémieux.

The presumption was that El-melik was not a creditor of the deceased. A decision of the court of Lucca (March, 1887), confirmed by the Court of Appeals in Florence (December 16, 1887), declared, on the contrary, that he was presumed to be a debtor of Hussein Pacha, as he had not rendered his accounts. The French Consul, having to do with a claim which was not that of an Italian

or of the subject of a third power, refused El-melik, a French subject, the right of intervening unless he presented himself equipped with a decision of the French courts authorizing it.

El-melik refused to accept the consul's ruling; and although a Frenchman, summoned the French Consul before the Italian court. The summons was served on November 8, 1887. The French Consul asked the advice of local lawyers, who were of the opinion that he was not obliged to appear as respondent in such an action, and in consequence he did not appear.

On December 20, 1887, the French Consulate was notified of a judgment by default, dated the 17th of the same month, ordering the sequestration of the papers pertaining to the property, and the dispossession of the consul of the goods and effects pertaining to the property, with provisional execution.

The consul, though he considered the judgment rendered against him inapplicable, was, out of courtesy to the country to which he was accredited, preparing to lodge complaint, when the next day, December 22, 1887, during his absence, the pretor presented himself at the office of the consulate and called upon the chancellor to allow the execution of the judgment by default of December 17.

The chancellor of the consulate, M. Langlade, declared to the pretor: (1) that, waiving an inquiry into the legal aspects of the case, he could not, in his position as custodian of the archives, without order of the consul, allow a local authority to enter the office of the chancellery; (2) that the locked room in which the papers of Hussein Pacha were, was also used for the consular archives and the judicial records, and that their inviolability was assured by the Franco-Italian Treaty of 1862.

The Florentine pretor sent for the police and a locksmith. He ordered the door of the room containing the archives and records to be broken open; then entering, he proceeded to sequester the papers and documents which he thought belonged to the property, and thereto affixed his seals. In point of fact, among these papers were some belonging to the property in question, while others belonged to the consular archives, notably a file of official documents relating to the year 1877. (This fact was brought out in the protest made December 26, 1887, by the foreign consuls stationed at Florence.)

The chancellor drew up forthwith an official report stating the violation of the consular premises *manu militari*. The protest was immediately brought to the attention of the Italian Government by the consul and the French Ambassador, M. de Mouy.

The incident involved a question of principle of the greatest importance for diplomatic relations; moreover, all the governments represented in Italy were affected. The consuls of the different nations at Florence held a meeting under the presidency of their dean, Mr. Colnaghi, the British Consul, to draw up a protest. The drafting of this document was concluded December 26, 1887. It stated that the acts committed by the Italian pretor at the French Consulate at Florence were in violation not only of the Franco-Italian Convention of 1862, but also of the fundamental principles of the law of nations.

The consuls, upon deliberation, voted unanimously (the French Consul excepted) the following motion: "In view of the gravity of the acts of which the above-named consuls have taken cognizance, it has been decided that each of them should refer the matter to his own government, and the present official report has been signed by all the parties, who have concluded that the original should be placed on file in the British Chancellery under protection of its inviolability." This important act was communicated January 15, 1888, to the various governments by their respective ambassadors accredited at Rome.

On the vigorous representations of the Cabinet of Paris to the Cabinet of the Quirinal, negotiations were opened.

In the meantime, while the two governments were devoting themselves to a thorough investigation of the alleged facts, El-melik continued his suit. Indeed, at the instance of El-melik, the parties concerned were on January 18, 1888, summoned to appear two days later (January 20) at the French Consulate to witness the pretor Tosini break the seals affixed by him December 22, 1887, and draw up an inventory of the effects of Hussein Pacha.

The announcement of this further proceeding at a time when negotiations were still pending called forth protests from France. The Italian Government made reply through semi-official organs that the matter at issue was only an action of judicial procedure



belonging to the courts, that it was not for the government to intervene, and that consequently there could not be imputed to the government action which would take place entirely without its jurisdiction.

Nevertheless, the Italian Cabinet notified M. de Mouy, French Ambassador at Rome, and General Menabrea, Italian Ambassador at Paris, that the breaking of the Italian seals on Hussein's effects had by order been indefinitely postponed.

General Menabrea sent to Rome M. Ressaun, Italian Minister Plenipotentiary at Paris, to see M. Crispi, President of the Council of Ministers.

A fresh inquiry was instituted at Florence by the prefect of the city and the attorney-general in order to complete and rectify the brief account of the matter first sent in to their government by the Italian authorities.

The investigation and the discussion of the judicial questions involved in the incident were brought before the board of disputed diplomatic claims acting for the Consulta at Rome. M. Canonico, a senator and judge in the Court of Appeals, was commissioned to make the report.

M. Crispi, President of the Council, and M. Zanardelli, Custodian of the Seals, both advocates and jurisconsults of the first rank, personally studied the points of law involved in the case.

Finally, on January 21, 1888, at a time when the Council of Ministers was in session at the Elysée under the presidency of M. Carnot, President of the Republic, General Menabrea presented himself there at the palace and sent word to M. Flourens, Minister for Foreign Affairs, that he had a communication to make to him.

The Minister for Foreign Affairs, leaving the Council, immediately received the Italian Ambassador, who communicated to him a dispatch received from his government, indicating the solution proposed by Italy for the conclusion of the difference.

The official note of the French Government on this subject, communicated in the afternoon of January 21, 1888, was as follows:

"M. Flourens, Minister for Foreign Affairs, this morning received the Italian Ambassador, General Menabrea, who sought

him out at the Elysée during a meeting of the Council of Ministers in order to communicate to him a telegram from M. Crispi, in consequence of which the incident at Florence may be considered closed.

"The pretor, Tosini, will be transferred so as to have no further contact with the French Consul at Florence.

"The effects left by Hussein will be dealt with conformably to the clauses of the convention between Italy and Tunis in 1868, the provisions of which have never been questioned by our Cabinet, the Treaty of the Bardo having recognized all the conventions and international treaties anterior to its signature.

"The French Consul at Florence will not be censured."

Following this agreement, the pretor, Tosini, of Florence was censured and transferred elsewhere. The *Berliner Tageblatt* announced, February 19, 1888, that this magistrate had been granted advancement. But this information has since been officially denied.

(Translation. *Journal du Droit International Privé* [1888], vol. xv, pp. 53-57.)

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### § 3. OFFICERS

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#### THE CASE OF THE FORTE (1863)

WHILE the discussion between Great Britain and Brazil relative to the plundering of the barque *Prince of Wales* was in progress, Rear-Admiral Warren reported to the British Minister at Rio de Janeiro "a disagreeable incident," which he described as a "brutal outrage" on three officers of his flagship, the *Forle*, by the Brazilian guard stationed on Tijuca Hill. The officers in question were the chaplain, a lieutenant, and a midshipman. It was stated that at 7 o'clock on a certain evening, while they were passing the police guardhouse at Tijuca, a sentinel advanced and made a motion with his musket; that the chaplain inquired, "Que quere V.?" that the sentinel then struck him with his musket, attempted to stab him with the bayonet, and called the

guards, who rushed upon him with bayonets and swords; that all three officers were then arrested and confined in the guardhouse; that on the next morning they were marched through the streets of Rio under escort, though they offered to hire a carriage; that at the Rio police office, though they gave their names and rank, as they had done the evening before at the guardhouse, they were kept for two hours in a filthy den with men and boys of the lowest grade; that they were then, at the request of the British Consul, with whom they had been permitted to communicate, removed to a better prison, and were afterward taken in a carriage to a barrack and well treated; and that on the morning of the second day after their arrest they were released by order of the chief of police.

On the part of the Brazilian Government it was stated that "three foreigners, having dined at the hotel of Robert Bennett, on the Tijuca Hill, where they had two bottles of Bordeaux wine and one-half bottle of Cognac, were proceeding to the city;" that "the said foreigners" annoyed the passers-by, "attempting to unhorse an equestrian who was going home quietly, and violently seizing the reins of his horse;" that when they arrived at the guardhouse they mounted the steps and approached the sentinel, one of them asking, "What are you doing there?" that the sentinel told them to retire, when they broke out into threats and began to strike him with their sticks so that he was compelled to defend himself with the stock of his gun and call the guards; that they resisted arrest, "laying hold of the soldiers and falling on the ground with them;" that, being deposited in the guardhouse, they refused to answer any questions, "showing themselves haughty and scornful;" that, though they refused to give their names, the commandant treated them with kindness, furnishing them, at their request, with writing paper and playing cards, and placed at their disposal his own bed, the only one in the guardhouse; that they "were not completely drunk," but "appeared not to be in full possession of their mental faculties;" that when they were brought into the city, they were placed not in the slaves' prison, but in that of freemen, where there might, indeed, be prisoners of color, as the Brazilian legislation made no discrimination on that ground; that as soon as their condition was made known to the

chief of police they were transferred to the barracks of the police corps and an order was given for a circumstantial report on the case; and that as it appeared by this report that "the acts of the English officers were merely the result of the state in which they were at the time," an order was given for their discharge.

The English officers denied the allegations as to their intoxication, their annoyance of persons on the road, and their use of threats toward the sentry. They declared that no resistance was made to the guards by two of the officers, and that resistance was made by the third only after he had received gross treatment. They also stated that when taken to the guardhouse they gave their names to the ensign, both verbally and in writing, through an interpreter. They admitted that the officer of the guard provided them with paper and with a pack of cards, and offered a bed to one of them; but they alleged that he broke his promise to forward their letters, which never reached their destination.

The British Minister at Rio was instructed by Earl Russell to demand (1) that the ensign of the guard be dismissed from the service; (2) that the sentry who began the attack be adequately punished; (3) that an apology be made by the Brazilian Government; and (4) that the chief of police of Rio de Janeiro be publicly censured.

Demands having thus been formulated in the case of the *Forte*, as well as in that of the *Prince of Wales*, steps were taken to resort to reprisals in the event of the requisite redress being denied. The British Minister at Rio was instructed that a ship or some other portion of public property might be seized and held as security till justice should be done; but that as such a course might lead to a collision, it might be preferable to seize private property. This was, however, left to the discretion of Admiral Warren, who, after the Brazilian Government had refused to yield to his government's demands, seized at sea and detained five Brazilian vessels. It was subsequently arranged that the claim in the case of the *Prince of Wales* should be paid under protest and the captured vessels released, the Brazilian Government assuming responsibility for any losses which might have resulted to the citizens of third countries, and that the case of the *Forte* should be submitted to arbitration.

The King of the Belgians, who was chosen as arbitrator, made the following award:<sup>1</sup>

"We, Leopold, King of the Belgians, having accepted the duties of arbitrator conferred on us by the common consent of Great Britain and Brazil, in respect to the difference raised between these states in regard to the arrest, June 17, 1862, by the Brazilian police guard stationed at Tijuca, of three officers of the British marine, and the incidents which took place subsequent to, and on the occasion of this arrest;

"Animated by a sincere desire to render a strictly impartial decision in acknowledgment of the faith placed in us by the said states;

"Having to this end duly examined and maturely weighed all the documents which have been produced on one side and on the other;

"Being desirous, in order to fulfill the charge which we have accepted, of bringing to the knowledge of the high parties concerned the result of our examination as well as our arbitral decision on the question submitted to us in the following terms, to wit:

"If the way in which Brazilian laws were applied to the English officers could be considered an offense to the British navy;

"Considering that it is by no means proved that the conflict arose from an act of the Brazilian agents, who could not reasonably have any motive for provocation;

"Considering that the officers at the time of their arrest were not clothed with the insignia of their rank, and that in a port frequented by so many strangers they could not suppose it possible to have their mere word accepted that they belonged to the British navy so long as no visible indication of their character was offered in support of their statement; that, consequently, as soon as they were arrested, it was their duty to submit to the existing laws and regulations and that they had no right to demand any different treatment from that which would be accorded to any other persons in the same circumstances;

"Considering that while it is impossible to ignore that the incidents which took place were disagreeable to the English officers

<sup>1</sup> Translation. *British and Foreign State Papers*, vol. 53, pp. 150-51.

and that the treatment to which they were subjected must have seemed to them unusually severe, nevertheless it must be taken into account that when by the declaration of the English Vice-Consul the social position of these officers was duly established, measures were immediately taken to assure them of the special consideration in which they were held, and they were thereupon set at liberty without further ado;

"Considering that the officer who ordered their release did so as soon as it was possible, and that in so doing he was actuated by the desire to spare these officers the vexatious consequences which according to the provisions of the law must necessarily have resulted to them had any further consideration been given to their action;

"Considering that, in his report of July 6, 1862, the prefect of police was not only called upon to make a report of what took place but that he was also obliged to explain his conduct to his superior together with the grounds for the leniency which he had shown;

"Considering moreover that he was acting in a perfectly legitimate manner in expressing himself as he did, and that he cannot be considered to have had any malevolent intention;

"We are of the opinion that in the manner in which Brazilian laws were applied to the English officers there was no offense, premeditated or otherwise, toward the British navy.

"Done and given in duplicate, under our royal seal, at Château de Lachen, the eighteenth day of the month of June, 1863.

"LEOPOLD I."

After this decision in favor of Brazil was rendered, Mr. (afterward Sir) Edward Thornton was sent by the British Government as envoy extraordinary and minister plenipotentiary on a special mission to express to the Brazilian Government the regret of Her Britannic Majesty for the circumstances under which friendly intercourse between the two countries was suspended; to disavow any intention to offend the dignity of Brazil by the measures that were taken, and to propose the renewal of diplomatic relations. The Emperor replied, saying that it was with sincere satisfaction that he renewed diplomatic relations, and

that the policy of Brazil would continue to be animated with a spirit of justice toward all other nations.

(Extracted, except for the translated portion, from Moore: *International Arbitrations*, vol. v, pp. 4926-28.)

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### CAPTAIN GAMBLE'S CASE (1818)

IN a note dated January 22, 1818, to Mr. Hyde de Neuville, French Minister at Washington, Mr. Adams, Secretary of State, offered the following explanations:

"At the time when I had the honor of receiving your letter of 16 October last, concerning a transaction in the port of Marseilles, in which Captain Gamble of the sloop-of-war *Erie*, a public ship in the service of the United States, was summoned before the tribunal of commerce at that port for damage asserted to have been done to the cable of an English vessel called the *Herald*, and was alleged to have prevented the execution of the citation upon him, on board of his own vessel, that officer being absent from the United States, it was thought due to justice, before I should answer your letter, to wait for his report upon the circumstances of the case. That report was expected to be shortly received, having been already required of him, upon a complaint which had been received at this Department from the British Minister, Mr. Bagot, in behalf of Captain Snowden, the master of the British vessel, the cable of which was stated to have been damaged. Captain Gamble's report has accordingly been received; from which it appears that the place occupied by the *Erie*, at the time when the accident happened, had been assigned to Captain Gamble, at the time of his arrival in the harbor, by the proper officer of the port, and without any objection from the master of the English vessel; that the damage done to the cable was altogether accidental, without any intention or fault of Captain Gamble; that the conduct of the master of the *Herald* was rude and offensive towards him, and that, in declining to receive the citation of the tribunal of commerce, he had reason to believe that it would be received by the consul of the United States.

"I am directed to assure you, sir, that the President has a deep

sense of the respect due by the officers, commanding vessels of war, to the institutions and authorities of the foreign ports into which they are received. He is persuaded at the same time that your government will duly appreciate the feelings and the sense of duty to his own flag, of an officer commanding a public vessel of his nation in a foreign port. The British Minister has been informed that the damages awarded by the decision of the tribunal of commerce to the master of the *Herald*, together with the charges of the suit, will be paid by this government, and it is not doubted that this manifestation of respect to the decision of the tribunal of commerce of Marseilles will be received by your sovereign as an evidence of the spirit of amity and of good harmony which the United States will be on all occasions earnestly desirous of cultivating with his government."

(Moore: *Digest of International Law*, vol. II, pp. 585-86.)

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#### PROTECTION OF AMERICANS IN TURKEY (1895)

APRIL 7, 1895, the Turkish Minister at Washington, referring to a report in the press that two United States men-of-war were to be sent into Turkish waters on account of rumors that the safety of Christians was menaced, inquired whether it was true, as was publicly asserted, "that the American naval authorities have been instructed to confer with your diplomatic and consular authorities with a view to the examination of certain matters which come within the exclusive province of the latter."

The Department of State replied that the intended visit of the ships was "without any unfriendly purpose," and that their presence on the coasts of Asia Minor would "afford an opportunity to learn whether there is just ground for the apprehensions of insecurity of life and property," which American citizens in that region had expressed and which had called forth assurances of protection from the Porte.

The instructions to the naval officers directed them to visit certain places on the coast of Asia Minor and ascertain, by conference with the United States consuls and citizens there, what foundation existed for the rumors that Christians were in danger, and,



in case they should discover ground for anxiety, to intimate to the Turkish officials that it was the intention of the United States to afford protection to its citizens.

In a later communication of June 6, 1895, addressed by the Department of State to the Turkish Minister, Mr. Uhl, Acting Secretary of State said:

"It is proper for me to recur to that part of your . . . note of April 7 last, in which you asked to be informed whether the American naval authorities had been instructed to confer with the diplomatic and consular authorities touching matters which you deem to be 'within the exclusive province of the latter.'

"I cannot suppose you thereby intended to question the right of this government to use its several agencies in its own discretion for the purpose of gaining information or carrying out its determined policies, and I assume you had in view merely the performance of the usual formalities of international representation. Our naval commanders, carrying neither diplomatic credentials nor consular commissions, discharge no representative duty save in conformity with the ordinary etiquette of the naval intercourse of nations. This mission, I am pleased to learn, has been fulfilled with friendly cordiality by Admiral Kirkland and his commanders, consistently with the instructions given to them as stated in my note to you, No. 10, of April 8, 1895."

(Modified extract from Moore: *Digest of International Law*, vol. IV, pp. 618-19.)

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### RESTORATION OF ORDER IN SAMOA (1889)

AFTER a native revolt in Samoa (September, 1888), which had resulted in the landing of German forces there, Admiral Kimberly was ordered by the Government of the United States to proceed in his flagship to Apia.

Admiral Kimberly was instructed that the United States was willing to coöperate, in accordance with the German invitation of January 10, 1889, in restoring order in Samoa "on the basis of the full preservation of American treaty rights and Samoan authority, as recognized and agreed to by Germany, Great Britain, and the United States," and that the German Government had been

so informed. He was to extend full protection and defense to American citizens and property, and inform himself as to the situation; to protest against the subjugation and displacement of the native government by Germany, as in violation of the positive agreement and understanding between the treaty powers, but to inform the representatives of the British and German Governments of his readiness to coöperate in causing all treaty rights to be respected and in restoring peace and order on the basis of the recognition of the Samoan right to independence.

(Modified extract from Moore: *Digest of International Law*, vol. I, pp. 544-45.)

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#### § 4. SOVEREIGNS: HEADS OF STATES

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##### DE HABER v. THE QUEEN OF PORTUGAL (1851)

THE personal immunity of a foreign sovereign from suit and outrage is so well recognized and respected as to make it difficult to find a suitable illustrative case. *De Haber v. The Queen of Portugal* is not really in point, since the suit was brought against Dofia Maria da Gloria, Queen of Portugal, in her public capacity. At the close of the arguments in that case Lord Campbell, Chief-Justice, in his judgment delivered May 28, 1851, in the course of which he made an absolute rule prohibiting the Lord Mayor's Court from proceeding further with the suit, remarked: "To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent." (*Queen's Bench Reports*, vol. XVII, pp. 196-214.)

## CHAPTER II

### METHODS OF PROCEDURE FOR THE SETTLEMENT OF INTERNATIONAL DIFFERENCES

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#### § 5. DISCUSSION AND COMPROMISE

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COMPROMISE through discussion is the very essence of diplomacy. The representatives entrusted with the care of the international interests of their state depend upon their ordinary informal and friendly intercourse as individuals to reach a satisfactory understanding for the disposition of the vast majority of questions which arise. The representative of each government recognizes that the other will firmly maintain those views which his government considers as essential to the protection of its interests and as the expression of its national ideals, but he will at the same time recognize that the other government must sometimes cherish views opposed. In the great majority of cases, where a common spirit of friendliness prevails and both are actuated by a desire to reach some satisfactory solution of the difficulty without sacrificing the principles which each government feels it must sustain, there is little difficulty in reaching an understanding. Such a result may be effected through the application of the well-recognized principles of international law, or by a compromise which takes into consideration the relative importance to the governments concerned of the matter in dispute. Even in those instances where any compromise at all may seem to be a yielding upon a question of principle, the difficulty can often be obviated by a formal notification to the effect that the compromise agreed upon shall not be considered as a precedent to bind the government in its future action.

We may divide the cases which come before diplomats for their consideration into three classes:

(1) Those which may be arranged by the simple application of the principles of international law recognized by both governments. In such a case diplomatic discussion is necessary only to elucidate the true principles.

(2) Those cases in regard to which the two governments maintain different interpretations of the law applicable. Such instances may be settled by the procedure to which we have referred, failing which the intercourse of nations still holds in reserve recourse to certain useful methods, such as mediation or arbitration.

(3) The third class of difficulties relates to political questions. The absence of any ruling principle of international law to which the parties can appeal interferes with the application of arbitration so that the peaceful solution of the difficulty has to rest upon compromise through discussion, perhaps aided by the mediation of one or more third states. The success which a state attains in the maintenance of its political views bears a direct relation to its military and economic strength and the prestige due to its alliances. The recognition of this situation means that any compromise effected by diplomatic discussion must, to be acceptable, take into account the relative military and political strength of the interested governments.

Whenever the delicate machinery of diplomatic negotiation has succeeded in reaching a happy compromise in settlement of the question under consideration, it is important to preserve for reference some record of this agreement. The elasticity of diplomacy and the scrupulous good faith which governments so generally observe in their transactions do not make it necessary to clothe such a compromise solution in any particular form. Ordinarily an exchange of notes suffices. In certain cases, however, when the matter is of sufficient importance, or when it is intended to establish a rule to fix the rights of individuals within the state, the agreement or compromise is formally incorporated in the provisions of a treaty.

## § 6. MEDIATION AND GOOD OFFICES

## THE CAROLINE ISLANDS (1885)

IN 1885, His Holiness Leo XIII made, as mediator between Germany and Spain in the controversy touching the Caroline and Pelew Islands, the following "proposition":

"The discovery made by Spain in the sixteenth century of the Caroline and Pelew Islands, which form part of the archipelago, and a series of acts accomplished at different periods by the Spanish Government in those same islands for the good of the natives, have, in the conviction of that government and of that nation, created a title to the sovereignty founded on the maxims of international law invoked and followed at that period in the case of analogous disputes. In fact, when one examines the history of the above-mentioned acts, the authority of which is confirmed by divers documents in the archives of the Propaganda, one cannot fail to recognize the beneficial work of Spain towards those islanders. It is also to be remarked that no other government has ever exercised a similar action over them. This explains the constant tradition, which must be taken into account, and the conviction of the Spanish people relative to that sovereignty—tradition and conviction which two months ago were manifested with such an ardor and animosity, capable for a moment of compromising the internal peace and relations of two friendly governments.

"On the other hand, Germany and England in 1875 expressly informed the Spanish Government that they would not recognize the sovereignty of Spain over the said islands. On the contrary, the Imperial Government thought it is the effective occupation of a territory which creates the sovereignty, occupation which was never carried into effect on the part of Spain in the Caroline Islands. It was in conformity with this principle that it acted in the Island of Yap, and in that, as on its part the Spanish Government has also done, the mediator is pleased to recognize the complete *loyalty* of the Imperial Government.

"Consequently, and in order that this divergence of views between the two governments be not an obstacle to an honorable

arrangement, the mediator, after having well considered the whole question, proposes that in the new convention to be stipulated they shall observe the forms of the protocol relative to the Sooloo Archipelago signed at Madrid on the 7th of March last between the representatives of Great Britain, Germany, and Spain, and that the following points be adopted:

"1. To confirm the sovereignty of Spain over the Caroline and Pelew Islands.

"2. The Spanish Government, to render her sovereignty effective, engages to establish as quickly as possible in that archipelago a regular administration with sufficient force to guarantee order and the rights acquired.

"3. Spain offers to Germany full and entire liberty of commerce and navigation, and of fishing at the same islands, as also the right of establishing a naval station and a coal depot.

"4. The liberty of making plantations in those islands, and of founding agricultural establishments on the same footing as Spanish subjects, to be also guaranteed to Germany.

"L. CARD. JACOBINI.

"ROME, FROM THE VATICAN, October 22, 1885."

This proposition was accepted by the governments to which it was made, and was embodied in the following protocol:

"The undersigned, His Excellency the Marquis de Molins, Ambassador of His Catholic Majesty near the Holy See, and His Excellency M. de Schloezer, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Prussia near the Holy See, being duly authorized to conclude the negotiations which the Governments of Spain and Germany, under the accepted mediation of His Holiness the Pope, have pursued in Madrid and Berlin relatively to the rights which each of said governments may have acquired to the possession of the Caroline and Pelew Islands, considering the propositions made by His Holiness as a basis for a mutual understanding, have agreed upon the following articles in accordance with the propositions of the august mediator. . . ."<sup>1</sup>

(Moore: *International Arbitrations*, vol. v, pp. 5043-46.)

<sup>1</sup> For the text of these six articles signed at Rome December, 1885, making arrangements for the carrying into effect of the Pope's "proposition," see Moore's *International Arbitrations*, vol. v, pp. 5044-46.

PROTECTION OF VENEZUELAN CITIZENS  
IN FRANCE (1895)

MARCH 12, 1895, the United States instructed its ambassador at Paris as follows: "At the request of the Venezuelan Government you will, with the acquiescence of the Government of France, upon the retirement of the Venezuelan Minister and upon application by him, afford your friendly good offices for the protection of Venezuelan citizens in France; but you will not represent Venezuela diplomatically, nor will consuls under you act in official representation of Venezuela." The French Government "acquiesced in the proposed arrangement, provided, however, that the pending diplomatic questions would have to be settled between France and Venezuela themselves." This proviso was in accord with the instruction that the embassy was not to represent Venezuela diplomatically.

(Taken textually from Moore: *Digest of International Law*, vol. IV, p. 591.)

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THE CASE OF MARTIN KOSZTA<sup>1</sup> (1853)

ON the morning of July 2, 1853, Commander Ingraham, of the U.S.S. *St. Louis* at Smyrna, demanded the release of Martin Koszta detained against his will on board the Austrian brig-of-war *Huszar*, threatening, if he did not receive a satisfactory answer by four o'clock in the afternoon, that he should cause the prisoner to be taken away by main force. The Austrian commander was preparing to resist, and as the hour approached the American commander ranged himself alongside the *Huszar* and brought his guns to bear upon her. The conflict was prevented through an agreement signed just in time by the American Consul and the Austrian Consul-General, in conformity with the terms of which Koszta was placed in the custody of the French Consul-General, who was not to deliver him up except upon a requisition of both those officials. Such a requisition, addressed to the French Consul-General, was signed by them October 14,

<sup>1</sup> For the discussions concerning this famous case, see p. 298, where the case is more fully treated.

1853, under instructions received from the American and Austrian Ministers at Constantinople; and on the same day Koszta took passage on the bark *Sultana* for Boston. The Austrian Minister at Constantinople had sought in the correspondence to reserve the right of Austria to proceed against Koszta in case he should again be found in the Turkish dominions; but the American Consul at Smyrna refused to sign a requisition containing such a reservation, and the requisition on which Koszta was, with Austria's concurrence, actually released, was unconditional.

(Modified extracts from Moore: *Digest of International Law*, vol. III, pp. 820, 845.)

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## § 7. CONFERENCES

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### THE FIRST HAGUE PEACE CONFERENCE (1899)

ON August 24, 1898, Count Mouravieff, Russian Minister for Foreign Affairs, at the regular weekly reception of the diplomatic corps, communicated to the representatives of the powers a copy of a rescript from Nicholas II calling attention to the evils of the burdensome armaments to which the powers of the world were subjected and stating that the Imperial Government believed that "the present time" was "very favorable for seeking, through the method of an international conference, the most effective means of assuring to all nations the benefits of a real and lasting peace, and of placing before all the question of ending the progressive development of existing armaments." "Impressed with this sentiment," the rescript relates, His Majesty had been pleased to command Count Mouravieff to "propose to all the governments who have duly accredited representatives at the Imperial Court, the holding of a conference to consider this grave problem. . . ."

The United States accepted this invitation without delay, but certain of the European powers required first some further explanations as to the nature of the proposed discussions, especially in view of the general misunderstanding on the part of the European press of the meaning of the Mouravieff circular. On Sep-



tember 4 an official explanation appeared in the *Journal of St. Petersburg* explaining that the purpose of the conference was to do away with the excesses of the "present system of armed peace" by providing for a "full and searching investigation of this question by an international exchange of views." The explanation continues: "Certain other questions, difficult of solution, but of not less moment, have already been settled in this century in a manner which has done justice to the great interests of humanity and civilization. The results which in this connection have been obtained at international conferences, particularly at the Congresses of Vienna and Paris, prove what the united endeavors of governments can achieve when they proceed in harmony with public opinion and the needs of civilization. . . ."

Before the end of October all the invited states had accepted the Russian invitation. On January 11, 1899, the Russian Government issued a second circular containing a program for the work of the conference, which, in addition to the matter of limiting the increase of military and naval armaments, proposed to discuss the regulation of the use of certain instruments and methods of warfare and the extension of the provisions of the Geneva Convention (Red Cross) to naval warfare; the revision of the "declaration in regard to the laws and customs of war, elaborated in 1874 by the Brussels Conference;" and finally "the acceptance in principle of the usage of good offices, of mediation, and of optional arbitration for such cases as lend themselves to it, with a view of preventing armed conflicts between nations; an understanding upon the subject of their mode of application, and the establishment of a uniform code of practice in their use."

The circular closes by stating that all questions concerning the political relations of states and the order of things established by treaties, "as, in general, all questions which do not enter directly into the program adopted by the cabinets ought to be absolutely excluded from the deliberations of the conference," and suggests that the conference should not meet in a capital of one of the great powers. In conformity with this program the Government of the Netherlands, on April 7, 1899, invited the powers to meet at The Hague. Twenty-six states accepted the invitation and the first meeting of the Conference was held on May 18,

1899. After several weeks filled with important discussions the assembled delegates completed their labors by signing, on July 29, 1899, the Final Act of the Conference which contains, among other conventions, a codification of the laws of war based upon that discussed by the Conference of Brussels which was itself, for the most part, a reproduction of the document by Francis Lieber, issued on April 24, 1863, by the United States as a general order to govern the conduct of its armies in the field. But of greater importance still was that illustrious CONVENTION FOR THE PEACEFUL SETTLEMENT OF INTERNATIONAL DIFFERENCES. This convention established the Hague Permanent Court of Arbitration and provided a code of procedure, based upon the experience of nations, well adapted for the practical application and extension of international arbitration.

(*Foreign Relations of the United States, 1898, 1899*; Frederick W. Holls: *The Peace Conference at The Hague* [New York, 1900]; Moore: *Digest of International Law*, vol. VII, pp. 78-94, 338.)

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#### § 8. ARBITRATION, ARBITRAL PROCEDURE, AND THE PRESENTATION OF CLAIMS

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FROM the selected cases contained in the pages of this volume the reader will notice the application of certain of the rules of procedure governing the conduct of arbitration and the submission of claims for examination by international commissions. The agreement on arbitration, or the *compromis*, is, to the extent of its provisions, recognized as the governing rule, but in the absence of specific regulations to the contrary, certain rules of procedure which have been tested by experience are generally applied by the tribunal. Since the adoption of the remarkable Hague Convention for the Peaceful Settlement of International Differences it has been customary to include in the *compromis* a clause referring to that convention the regulation of all questions of procedure not expressly covered by agreements between the parties.

In the succeeding pages will be found instances illustrative of the rules of arbitral procedure and the presentation of international claims. The instances which relate to the claims of individuals might be classed, for the most part, under the following heads:<sup>1</sup>

- (a) The determination of what constitutes an interest of the demanding government such as to justify, in international law, its interposition in favor of the claimant.
- (b) When properly presented, the tribunal will consider the claim on its merits unless it be barred by:
  - (1) Agreement of the governments concerned.
  - (2) Previous examination so as to be excluded by the rule of *res judicata*; i.e., exception of a previous judicial decision.
  - (3) By limitation and prescription, that is to say, the failure on the part of the demanding Government through a long period of years to employ a reasonable activity in keeping the claim alive by urging it on the defendant Government. As a consequence of such omission the claim is looked upon as outlawed.
  - (4) Laches on the part of the claimant; that is to say, negligence or failure to use a fair degree of diligence in availing himself of all reasonable means of securing redress.

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### THE JOHN H. WILLIAMS CLAIM (1885)

MR. JOHN LITTLE, Chairman of the United States and Venezuelan Commission under the Convention of December 5, 1885, made the following award in the claim of John H. Williams *v.* Venezuela:

"It appears from the papers transmitted us that in 1841 John H. Williams, a merchant in New York, sold and delivered

<sup>1</sup> This extremely important question of international claims has been carefully considered in an interesting volume by Edwin M. Borchard (*The Diplomatic Protection of Citizens Abroad*), who, in his former position of Assistant Solicitor of the Department of State, was able to study at first hand the actual practice of our government.

in that city to an agent of the Venezuelan Government certain mirrors with mountings for the Government House at Caracas for \$2,489.11, which were duly forwarded and received.

"On the 24th day of April, 1868, Mr. Williams presented the account against that government before the former commission for these articles as of the date of November 9, 1841, and verified it under oath, claiming an award, including interest at 7 per cent, of \$7,019.11. The account had before been sent to the United States legation at Caracas for collection, but how long before does not appear. It had not, previous to 1868, been brought to the attention of the Venezuelan authorities from any source, so far as shown, and no reason or explanation is given for delay in presentation.

"Venezuela claims the goods were paid for at the time of purchase. On the issue of fact thus made she was (1868) and is placed at a disadvantage by the long lapse of time as to the matter of personal testimony, some, if not all, her witnesses to the transaction having before then died.

"The question with some collateral ones is thus presented whether time, figuratively stated, testifies in these adjudications. This case could perhaps be disposed of upon other grounds and in comparatively few words; but as the same question with like resulting ones is involved in other cases argued and submitted, we have concluded to treat it with some fullness and dispose of the case from this standpoint, in view of the fact that the general question appears to be a somewhat mooted one with each government.

"It thus appears then the claim was not brought to the attention of the Venezuelan Government until twenty-six years after its inception. Its ownership, nature, and amount were such as would have made a delay in presentation to the debtor for a single three months a matter of surprise. By lapse of time the means of defense have been impaired, and there is total want of excuse for the long delay by claimant. Under such circumstances what does the law require at our hands?

"It is a well-settled principle in common-law jurisdictions, and a recognized one in civil law countries, that obligations are to be enforced according to the *lex loci fori* which here is the treaty and

the public law. Beyond the requirement that its decisions must be according to justice, the treaty furnishes no guide to the commission respecting the operation of the lapse of time in extinguishing obligations. It is left to the direction of international law on the subject. Does that recognize the doctrine of such extinguishment as between states in controversies like these? The question has been argued with exceptional force and ability by counsel for the respective governments.

"It will, perhaps, not be amiss to group extracts from the deliverances of some of the leading authorities upon the general doctrine of prescription and pertinent principles. We present them as they have been consulted, and without reference to any special order. It may be well preliminarily to note that, while individual interests are involved, these controversies, as elsewhere seen, are between states in some sense, and stand much as if so originating; and, further, that while the texts will be seen largely to relate to territorial acquisitions the principles announced comprehend the acquisition and loss of personal property, and pertain to other rights as well."

[The learned commissioner then proceeds to give several pages of important and interesting citations from the authorities relative to limitation and prescription. As a result of his consideration of the opinions of the jurists and the arguments of the parties, he concludes as follows:]

"Upon these principles, too lengthily discussed, without awaiting further proof called for in defense from Venezuela, we disallow claim No. 36. It was withheld too long. The claimants' verification of the old urgent account of 1841, twenty-six years after its date, without cause for the delay, supposing it to be competent testimony, is not sufficient under the circumstances of the case to overcome the presumption of settlement."

(Moore: *International Arbitrations*, vol. IV, pp. 4181-99.)

## § 9. MEASURE OF DAMAGES

## RUSSIA v. TURKEY (1912)

*Special Arbitral Tribunal at The Hague constituted by virtue of the Arbitration Agreement signed at Constantinople between Russia and Turkey, July 22/August 4, 1910.*

THIS was a case involving a claim for interest on certain deferred payments of an indemnity, which, as a result of the war of 1877, Turkey had undertaken to pay to victorious Russia. Article 5 of the treaty of peace signed at Constantinople January 27/February 8, 1879, stipulated as follows:

"The claims of Russian subjects and institutions in Turkey for indemnity on account of damages suffered during the war will be paid as soon as they are examined by the Russian Embassy at Constantinople, and transmitted to the Sublime Porte. The total of these claims shall in no case exceed 26,750,000 francs. Claims may be presented to the Sublime Porte beginning one year from the date on which ratifications are exchanged, and no claims will be admitted which are presented after the expiration of two years from that date."

For the purpose of examining the claims, a commission was appointed by the Russian Embassy, and the Turkish Government was accorded the right to have a delegate take part in the examination. This commission fixed the total losses of Russian subjects at 6,186,543 francs. Demand was duly made by the Russian Government for the payment of this sum, but it was not till December, 1884, that Turkey paid the first installment on account, and then only after an intimation from Russia that she would be obliged, in the event of further delay, to acknowledge for the *indemnitaires* [the recipients of indemnity] "their right to claim, in addition to the principal, interest proportional to the delay in the settlement of their claims."

As time went on, Russia repeated her demands, and Turkey her excuses, until, in 1891, Russia requested the Sublime Porte "to have immediate orders issued by the proper person so that the sum due may be paid without delay, as well as the legal in-

terest in regard to which the embassy had the honor of notifying the Sublime Porte by its note of February 15/27, 1887."

This demand for interest was made in due form, but in subsequent negotiations with the Porte, Russia accepted various payments without further stipulation for the payment of interest, never challenging Turkish statements of balance due. In July, 1902, however, when there was still outstanding the sum of 1,539 Turkish pounds, the Russian Embassy forwarded a petition from the *indemnitaires* claiming compound interest at 12 per cent from January 1, 1881, to March 15, 1887 (when the legal rate of interest in Turkey was lowered), and 9 per cent after the latter date. Thus from an original indemnity of something over six million francs, the moratory interest claimed amounted, in 1902, to twenty million francs. In the note accompanying this petition, Russia assumed that Turkey would admit the justice of the claims in principle, but might possibly object to the amount claimed. In such case, a joint commission was suggested to determine the sum due. Turkey made emphatic objection to any such claim, but expressed its willingness to submit the matter to arbitration at The Hague. In 1908, after four years' delay, Russia accepted this suggestion and an agreement to arbitrate was signed at Constantinople July 22/August 4, 1910.

Two questions were submitted for decision:

- "1. Whether or not the Imperial Ottoman Government must pay the Russian claimants interest-damages by reason of the dates on which the said government made payment of the indemnities determined in pursuance of article 5 of the Treaty of January 27/February 8, 1879, as well as of the protocol of the same date?
- "2. In case the first question is decided in the affirmative, what would be the amount of these interest-damages?"

The tribunal was composed of five members: Herante Abro Bey and Ahmed Réchid Bey, of Turkey, Baron von Taube and M. Mandelstam, of Russia, and M. Lardy, the Swiss Minister at Paris, who was chosen umpire.

The first session was held on February 15, 1911, when cases and counter-cases were exchanged. Thereupon adjournment was

made to October 28, 1912, at which date the tribunal reassembled to hear the oral arguments. The award was rendered November 11, 1912.

The demand of Russia was based upon the principle that states are responsible for the non-payment of their pecuniary obligations. This implies the obligation to pay interest-damages (*dommages-intérêts*) "and especially interest on sums unduly withheld." To admit otherwise would be contrary to international law, for then the debtor state would pay at its convenience, while the creditor state would be under temptation to resort to violence to secure its rights. In such case nothing could be expected from a "pretended international law incapable of compelling the promisor to keep his word." Russia was careful to point out that the claim was not for "conventional interest . . . arising from a particular stipulation;" the obligation that lay upon Turkey was to pay moratory interest, and it arose "from the delay in the performance of the act, that is to say, the partial non-fulfillment of the stipulation of the treaty of peace; this obligation arose indeed, it is true, from the treaty of 1879, but it proceeded *ex post facto* from a new and accidental cause, namely, the failure of the Sublime Porte to carry out its contract as it had pledged itself to do." Several arbitral awards supported this principle of responsibility of states as applied to money debts, especially in the obligation to pay moratory interest; among them, those of Mexico-Venezuela in 1903, Colombia-Italy in 1904, and the United States-Venezuela in 1885. The indemnity was not a donation on the part of Turkey for the benefit of the Russian victims of the war, and hence Turkey could not plead the exemption from moratory interest accorded by some codes to gifts. Turkey had received valuable consideration for the indemnity assumed, namely, cessation of hostilities, and the *indemnitaires* had always been considered, in the negotiations between the two powers, "as claimants not as donors." Turkey should have met these obligations promptly, for it was able to raise loans on favorable terms and during the period under consideration had paid off 350,000,000 francs of its public debt.

The general principle of the responsibility of states for the non-fulfillment of obligations was not denied by Turkey, but in inter-



national law, the Turkish argument maintained, there was no such thing as moratory interest. To create such an obligation there must be express stipulation. A state was not like other debtors; "the position *sui generis* [exceptional] of the state as a public power must be taken into account." *Fiscus ex suis contractibus usuras non dat*. (The state treasury allows no interest on its obligations.) If compelled to assume an obligation not stipulated for, a state would be made a "debtor to a greater extent than it would have desired." This might endanger the political existence of the state, injure its vital interests, confuse its finances, and prevent it from defending itself against domestic or foreign peril. The Roman law theory of responsibilities was analyzed and emphasis laid upon the distinction between compensatory interest and moratory interest; the former being interest "which is sometimes added to the money valuation of damages, to fix the total amount of an indemnity," the latter, "interest legally allowed in case of delay in the payment of money debts." Turkey admitted the responsibility of states for the payment of compensatory interest-damages, and on this basis explained the awards cited by Russia in support of her case.

In anticipation of any responsibility attaching to it for the payment of interest, Turkey pleaded various exceptions:—

1. *Force majeure* [necessity] — that Turkey for many years had been involved in financial and other difficulties which made it impossible to meet its obligations promptly.
2. The indemnity was of the nature of a gift, and hence exempt from the imposition of interest.
3. Three of the claimants had asked for interest before the commission at the Russian Embassy and had had their request refused. Hence, the principle of *res judicata* operated to set aside the present claim.
4. Russia had failed to follow up its demand for interest, and thus for eleven or twelve years "tacitly and indeed expressly" had renounced all benefit of suit. No reservations of interest had been made in the receipts given by the Russian Embassy, and neither party had mentioned interest for a period of ten years.

In its award the tribunal first rejected a preliminary request made by Turkey that the claim be set aside as properly the subject of private, not of governmental, action. The claim, the tribunal pointed out, originated in a war, "an international fact in the first degree." The damages to be paid to Russian subjects were included in the indemnities stipulated for in an international treaty, and were to be paid to Russia as sole creditor, irrespective of the manner of distribution among the individual claimants. In 1885, Turkey had, in consequence of protest by Russia, forborne to impose upon receipts, given by the Russian Embassy for payments on account, the stamp-tax required by Ottoman law from individuals, and had always accepted receipts from the embassy as proof of discharge of its obligations. For these reasons, therefore, the tribunal considered that it was necessary to proceed to an examination of the main question — the claim for interest because of delay in payment.

Addressing itself to the theories of responsibility, the tribunal brushed aside the elaborate distinctions which Turkey had sought to make. All interest-damages were by way of reparation, and hence compensatory. All culpability could be reduced, in the last analysis, to a money debt. The tribunal was, therefore, of the opinion "that the general principle of the responsibility of states implies a special responsibility in the matter of delay in the payment of a money debt, unless the existence of a contrary international custom is proven."

But the precedents all supported the contention of Russia. To prove its point, Turkey would have to cite instances where moratory interest, as Turkey understood it, was refused on the ground of its being moratory interest, and this, in the opinion of the tribunal, had not been done. In the case of the *Mosquitia* award, relied on by Turkey, the arbitrator had not refused moratory interest, as such, but had held that the principal was in the nature of a gift.

As for the argument advanced by Turkey that a state could not become a debtor to a greater extent than it wished, the tribunal held that responsibility of states could be denied only in its entirety. It was not possible to declare a state freed from responsibility in money debts without declaring it irresponsible for its

other obligations. A state could be condemned to compensatory damages for an act of violence without voluntary stipulation, and this might have a serious effect upon its existence. Hence, it was impossible to admit any exception to the responsibility of a public power in the matter of money debts.

This responsibility, following the analogy of European private legislation, implied the obligation "to pay at least interest for delayed payments as legal indemnity when it is a question of the non-fulfillment of an obligation consisting in the payment of a sum of money fixed by convention, clear and exigible." But it is equitable in such case that there be a demand for interest — simple interest — made in due form of law, and a debtor state is entitled in the matter to have a privilege accorded to private debtors.

Such demand the tribunal found to have been made by Russia in the note of January 12, 1891. Hence, Turkey was to be held responsible for interest on deferred payments from that date, unless the exceptions pleaded were well taken.

Of the exceptions, three were held by the tribunal to be inadmissible: *force majeure*, though it had been present in Turkish affairs, was not of sufficient magnitude to prevent Turkey from paying the comparatively small sum of six million francs; the indemnity was not a gift, but had been stipulated for value received; *res judicata* could not be established because the claim for interest arose, "*a posteriori* [afterwards], by reason of the dates on which the indemnities were paid." There remained the fourth exception — that Russia had lost all benefit arising from her demand of January 12, 1891, because, in subsequent negotiations, she had omitted to make express reservation for payment of interest. This was considered by the tribunal as well taken. "In private law," according to the award, "the effects of demand for payment are eliminated when the creditor, after having made legal demand upon the debtor, grants one or more extensions for the payments of the principal obligation, without reserving the rights acquired by the legal demand." As, in this capacity of creditor, there is an analogy between a state and an individual, Russia was considered by the tribunal to have forfeited her right to demand interest and hence the decision:

"That in principle the Imperial Ottoman Government was liable to moratory indemnities to the Imperial Russian Government from December 31, 1890/January 12, 1891, the date of the receipt of the explicit and regular demand for payment;

"But that, in fact, the benefit to the Imperial Russian Government of this legal demand having ceased as a result of the subsequent relinquishment by its embassy at Constantinople, the Imperial Ottoman Government is not held liable to pay interest-damages by reason of the dates on which the payment of the indemnities was made."

(*American Journal of International Law*, vol. VII, pp. 178-201; G. G. Wilson, *The Hague Arbitration Cases*; *Revue de Droit International* [1913], vol. 45, pp. 351-71.)

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## § 10. REVISION OF ARBITRAL AWARDS

### (a) *Res judicata*

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## THE PIOUS FUND OF THE CALIFORNIAS

*Permanent Court of Arbitration at The Hague, 1902*

THIS case has the distinction of having been the first to come before the Permanent Court of Arbitration under the Hague Convention of 1899. The matter for adjudication was the ultimate disposal of the income from a religious trust fund controlled by Mexico, but claimed in part by the United States for the benefit of the Archbishop of San Francisco and the Bishop of Monterey, prelates of the Roman Catholic Church. The early history of the fund was as follows:

Toward the latter part of the seventeenth century, the Jesuits undertook the conversion of the Indians of the Californias, and to that end were assisted by the liberal gifts of private donors, so that in the course of a century a large amount of money became available for this religious enterprise, under the name of the Pious Fund of the Californias. After the suppression of the Jesuit Order, the control of this fund vested in the King of Spain, but on the secession of Mexico from the Spanish dominion, he was succeeded

in this capacity of trustee by the Mexican Government, which in 1836 created the bishopric of the Californias and assigned to its bishop the control of the fund. In 1842, however, this arrangement was rescinded and governmental control resumed "for the purpose of carrying out the intention of the donors in the civilization and conversion of the savages." The properties were incorporated into the national treasury and sold, but an indebtedness of six per cent per annum was acknowledged as a lien on the treasury, which sum was to be duly applied for the original religious purposes. But when Upper California passed to the United States in 1848, no further payments were made on its account. Accordingly, when under the Treaty of 1868 a mixed commission was instituted by the United States and Mexico to pass upon all outstanding claims that the citizens of either state had against the government of the other, the Archbishop of San Francisco and the Bishop of Monterey presented a claim for a share of the income from the Pious Fund — that share, namely, which properly should be applied to religious purposes in Upper California. The two commissioners being unable to agree, the claim was referred to the umpire, Sir Edward Thornton, who in 1875 decided that Mexico should pay to the claimants \$904,070.99 in Mexican gold, being six per cent upon one half of the capitalized value of the Pious Fund for twenty-one years from 1848 to 1869.

Due payment of this award was made by Mexico who maintained that thereby the claim was extinguished in its entirety. The United States, on the other hand, contended that an installment of interest was due annually from 1869 and made repeated attempts to get a further settlement. At last by a protocol between the two governments in 1902, it was agreed to refer the claim to a special tribunal of four arbitrators and an umpire, selected in accordance with the provisions of the Hague Convention. The tribunal was to determine:

"1. If said claim, as a consequence of the former decision, is within the governing principle of *res judicata*; and

"2. If not, whether the same be just;

"And to render such judgment and award as may be meet and proper under all the circumstances of the case."

As members of the tribunal, the United States nominated

Professor Martens, of Russia, and Sir Edward Fry, of England; Mexico nominated Mr. T. M. C. Asser and Jonkheer A. F. de Savorin Lohman, of Holland. These selected, as fifth member, Professor Matzen, of Copenhagen, who *ex officio* presided. All five arbitrators were members of the Permanent Court of Arbitration.

Two lines of argument were developed in the conduct of the case: (1) as to the merits of the subject-matter in dispute; (2) as to the doctrine of *res judicata* involved. It is the latter, especially as applied to the awards of arbitral commissions, that constitutes the chief interest for international law.

1. As to the merits of the case, Mexico urged lack of title of the Californian bishops as trustees of the fund; absence of legal claim on the part of the Roman Catholic Church in Upper California to any interest in it; and further, the fulfillment of the object of the fund, as far as Upper California was concerned, viz., the conversion of the Indians. In reply, the United States cited Mexican legislation as recognizing the bishops as beneficiaries of the fund, and contended that, though Mexico might "sequester the property of its own religious corporations, no right could be exercised as against such corporations or bodies, citizens of the United States." The Roman Catholic Church, too, even if no perfect right existed in its favor, should be considered the equitable recipient of that part of the fund applicable to Upper California. As to the conversion of the Indians, that was but one of the purposes of the foundation; the primary purpose was to support the Roman Catholic Church and its missions, and in strict equity, so far from the fund being applied on the basis of Indian population in Upper and Lower California, it should be apportioned in proportion to the total population of the two countries.

2. The main controversy was over the doctrine of *res judicata* as applicable to the findings of arbitral commissions. Was the award of Sir Edward Thornton as to "the matters directly and impliedly in issue before the mixed commission" absolutely conclusive, or was it not? The United States maintained that it had the force of *res judicata* in all its parts, reasons (*motifs*) as well as conclusions, and that consequently Mexico was under obligation to pay to the claimants an annual installment of interest upon

one-half the fund in perpetuity; whereas Mexico maintained that it had bound her to pay only certain specified installments of interest — from 1848 to 1869 — and nothing else.

Mexico argued that a judgment had the force of *res judicata* only in its conclusions; "that is, to that part which pronounces acquittal or condemnation, *quod jussit veluit*." The reasons (*motifs*) for the decision did not have similar force. "The greater number of authorities [quoting Savigny] deny absolutely to the reasons [*motifs*] the force of *res judicata*, not excepting the case where the reasons are a part of the judgment." If this was true of the judgments of the permanent judiciary of a state, still more did it hold in the case of an award "rendered by arbitrators who have no real jurisdiction nor other powers than those granted them in the arbitration agreement." On this latter point Mexico maintained that the Commission of 1868 had gone beyond its powers in considering claims which had been extinguished by the treaty of Guadalupe Hidalgo in 1848. It had no authority to pass upon its own jurisdiction, and hence the decision of the umpire had been rendered on a matter not contemplated for submission. Even if Mexico, by paying the award of 1876, had to that extent acquiesced in the decision, the objections to the reasons given still remained valid. All that Mexico had to do was to pay twenty-one installments of interest in conformity with an award; no judgment had been rendered concerning an existing capital or further installments due, nor was Mexico bound to admit the validity of any claims to such.

The United States, on the contrary, argued that there were two classes of reasons (*motifs*), the subjective — depending upon the "personal equation" of the judge — and the objective, or necessary bases for the decision; and that "if the matters necessary to be found to make up a judgment had been debated between the parties, the judgment of necessity in these respects had the force of *res judicata*." This had been done in the case of Sir Edward Thornton's award, for before any decision could have been arrived at, "it was necessary that the court should have found the existence of a fund, the possession of it by Mexico, her obligation to pay interest thereon to the Catholic bishops, the yearly amount due by her on account of such obligation, and the number

of years for which she was in default" — all of which, therefore, were elements contributing to the decision and hence permanent in their binding effect. As to the Treaty of 1848, it was not intended to cancel claims against Mexico owned by those who, previous to the treaty, had been Mexican, but by the treaty had become American, citizens, as was the case with the Californian bishops. When the Commission of 1868 was instituted, the power to determine jurisdiction was not reserved for any appellate authority; such power must inhere somewhere; hence it must have inhered in the commission itself. Such a power was strictly in accordance with precedent. "Instances might, in fact, be multiplied indefinitely of cases where arbitral commissions have accepted or rejected jurisdiction, but we fail to find a precedent for the denial of the authority of arbitrators to pass upon the interpretation of the instrument creating them." Both in the common and the civil law, the doctrine of *res judicata* applied to arbitral decisions and it was similarly applied to the findings of international tribunals. Such decisions may be set aside because of fraud, excess of power or essential error, but such error must involve a subversion of "the natural law of nations," not merely a mistake in judgment. No such error, the United States contended, was apparent in the award of 1876, and "although Mexico sought to minimize its future effect, she did not nevertheless deny its absolute sanctity."

The tribunal, in its award, found substantially for the United States, except on the minor point of mode of payment, the tribunal holding that the sentence of Sir Edward Thornton, in so far as it enjoined payment in gold, applied only to the twenty-one annuities from 1848 to 1869, "because question of the mode of payment does not relate to the basis of the right in litigation, but only to the execution of the sentence."

The decisory part of the award was as follows:

"1. The said claim of the United States of America for the benefit of the Archbishop of San Francisco and of the Bishop of Monterey is governed by the principle of *res judicata* by virtue of the arbitral sentence of Sir Edward Thornton, of November 11, 1875; amended by him October 24, 1876.

"2. Conformably to that arbitral sentence, the Government



of the Republic of the United Mexican States must pay to the Government of the United States of America the sum of \$1,420,682.67 Mexican, in money having legal currency in Mexico, within the period fixed by article 10 of the protocol of Washington of May 22, 1902.

"This sum of \$1,420,682.67 will totally extinguish the annuities accrued and not paid by the Government of the Mexican Republic — that is to say, the annuity of \$43,050.99 Mexican from February 2, 1869 to February 2, 1902.

"3. The Government of the Republic of the United Mexican States shall pay to the Government of the United States of America on February 2, 1903, and each following year on the same date of February 2, perpetually, the annuity of \$43,050.99 Mexican, in money having legal currency in Mexico."

(*Pious Fund of the Californias*, Senate Document, No. 28, 57th Cong., 2d Sess.; G. G. Wilson, *The Hague Arbitration Cases*.)

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(b) Corruption of the tribunal

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## THE CLAIMS AGAINST VENEZUELA (1866-90)

AFTER a protracted and difficult negotiation, Venezuela and the United States signed, April 25, 1866, a convention referring the examination of the claims against Venezuela to a mixed commission for settlement. After the commission had been organized and had terminated its labors August 3, 1868, having disposed of all the claims submitted to it, the Venezuelan Government, February 12, 1869, presented to the Department of State at Washington a protest against the awards of the commission, alleging irregularity in the appointment of the umpire, and fraud in the proceedings and findings. This protest was not favorably received, and it was proposed in Congress to direct the President to demand of Venezuela the immediate payment of the awards, and, in case of her neglect or refusal to comply, to use such force as might in his judgment be necessary to secure the faithful performance of the terms of the convention.

Congress did in 1873 pass a bill recognizing the "final and conclusive" character of the claims adjudicated. Venezuela seems to have acknowledged her obligation, but domestic disturbances interfered with the regularity of her payments. In the meantime the attacks upon the commission continued.

In the first session of the Forty-fourth Congress a full investigation of the charges against the commission was at length held. It resulted in an elaborate report by Mr. Springer, from the Committee on Foreign Affairs, and in the adoption by the House, unanimously, of a resolution directing the Secretary of State to suspend the distribution of the sums paid by Venezuela on account of the awards. Subsequently, additional testimony was taken and printed by order of the House; important correspondence was communicated by the President to the same body, and a report was made by Mr. Hamilton, from the Committee on Foreign Affairs, recommending the creation of a new commission.

The charges against the commission, as developed in the investigation, were to the effect that before the meeting of the board a conspiracy was entered into by Talmage, the United States Commissioner, Thomas N. Stilwell, the United States Minister at Caracas, and William P. Murray, Stilwell's brother-in-law and the moving spirit in the matter, to defraud claimants by exacting of them a large proportion of their awards in the form of attorneys' fees; that, in pursuance of this agreement, Murray obtained contracts with claimants to represent them before the commission in consideration of from 40 to 60 per cent of whatever might be awarded; that the installation of Machado as umpire was brought about in an irregular manner; that on the claims which Murray represented awards were made to the amount of more than \$850,000, while many meritorious claims were rejected; that the certificates of award were made in small amounts and payable to bearer, so as to pass without indorsement; that Talmage, as the joint attorney of Murray and the claimants, withdrew the certificates from the commission; and that after the claimants had received the certificates representing their share of an award, the rest, representing the attorney's share, was divided between Murray, Stilwell, Talmage, and Machado. Whether Villafañe [the Venezuelan Commissioner] was in any measure a conscious

party to the transaction was considered doubtful. The charge of irregularity in regard to the selection of the umpire was that Baron Stoeckl, the Russian Minister at Washington, having appointed as umpire "Mr. Machado," notice to that effect was sent by the Department of State to the legation at Caracas; that Stillwell, as United States Minister, though there was a Juan N. Machado, Sr., and a Juan N. Machado, Jr., notified the latter that he had been appointed; that the suggestion of the name of Machado originally proceeded from the conspirators, and that the installation of Juan N. Machado, Jr., as umpire, was the result of their contrivance.

In spite of the findings of the committees of Congress in regard to the proceedings of the commission, no definite step toward a revision of the awards was taken till 1883.

In consequence of a special message sent to Congress by the President, May, 1882, the Committee on Foreign Affairs made a report rejecting the proposal of the Secretary of State to refer certain of the claims to the Court of Claims for investigation and declaring that there had been "no valid commission as called for by the treaty" and that "the alleged commission was a conspiracy; its proceedings were tainted with fraud;" and that justice to Venezuela demanded that "these proceedings should be set aside speedily and without circuitous action."

In accordance with these views the committee reported a joint resolution which, after adoption by both Houses unanimously, was approved by the President March 3, 1883.

This resolution was simple, direct, and logical. After starting out with the declaration that the evidence tended to show that the charges against the commission, "impeaching the validity and integrity of its proceedings," were "not without foundation," the resolution proposed:

"Therefore —

*"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he hereby is, requested to open diplomatic correspondence with the Government of the United States of Venezuela, with a view to the revival of the general stipulations of the treaty of April 25, 1866, with said government, and the appoint-*

ment thereunder of a new commission to sit in the city of Washington, which commission shall be authorized to consider all the evidence presented before the former commission in respect to claims brought before it, together with such other and further evidence as the claimants may offer; and from the awards that may be made to claimants, any moneys heretofore paid by the Department of State upon certificates issued to them, respectively, upon awards made by the former commission, shall be deducted, and such certificates deemed cancelled; and the moneys now in the Department of State received from the Government of Venezuela on account of said awards, and all moneys that may hereafter be paid under said treaty, shall be distributed *pro rata* in payment of such awards as may be made by the commission to be appointed in accordance with this resolution."

When Venezuela a few days later notified the United States of her intention of suspending payments on the awards under the Convention of 1866, pending the negotiation of a new arrangement, Mr. Frelinghuysen took the view that the joint resolution was a purely domestic act of the United States and that Venezuela should continue her payments until the negotiation of a new convention should be concluded. When the negotiations were resumed Mr. Frelinghuysen, in a note of June 11, 1884, reaffirming his contention as to the continued existence of the Convention of 1866, submitted a proposed draft of a new convention. The Venezuelan Government continued to maintain that in view of the action taken by Congress it could not "recognize any validity" to the "certificates made payable to bearer, issued by the prevaricating commission."

Mr. Frelinghuysen presented his views to the President in a report of January 27, 1885, in which he proposed that certain of the claims should be referred to the Court of Claims for investigation. This report the President communicated to the Senate that same day. The whole question was carefully considered by Mr. Rice in a report of February 18, 1885, from the Committee on Foreign Affairs presented to the House of Representatives, in which he said:

"This resolution, although not officially made known to Venezuela, was known to her as one of the public laws of the United

States; and it was not strange that she should conclude that the United States would no longer exact payment of installments upon those awards which the legislative and executive branches of her government had admitted based in fraud. . . .

"As to referring these awards, or any of them, to the Court of Claims, as recommended by the Secretary, your committee adopts the language and conclusions of the committee of the Forty-seventh Congress in reference to the same recommendation, then made by the Secretary, to the effect that Venezuela is entitled to an honest commission, as provided by the treaty, upon which she may have her representation, and should not be forced into a purely United States tribunal for action upon claims which she has a right to have passed upon by such a commission."

In conclusion, the committee reported a joint resolution expressed in substantially the same terms as that previously adopted.

After the change of administration Mr. Bayard, Secretary of State, signed on December 5, 1885, a convention for the creation of a new commission. The ratifications were not exchanged within the twelve months allowed because the Venezuelan Government did not approve the convention, though the objections were not officially presented until November 12, 1887.

At length a new convention was signed March 15, 1888, embodying the agreement in regard to the point of difference and extending the date of ratification of the Convention of 1885.

By this stipulation a revision of the proceedings of the old commission, in the broad sense and spirit of the resolution of Congress of March 3, 1883, was at length provided for. It turned out, however, that the time allowed for the exchange of the ratifications of the Conventions of December 5, 1885, and March 15, 1888, was insufficient; and on October 5, 1888, still another convention was signed, by which it was provided that the ratifications of all three conventions should be exchanged within ten months from August 15, 1888. The exchange was effected at Washington, June 3, 1889.

The peculiar circumstances under which the commission was created gave rise to various questions as to its duties and powers. These questions, which were general in their nature, and affected the board's relation to the cases decided by the old

commission, became the subject of argument and of a formal opinion.

In regard to the question as to whether the commission should "review" the former adjudications or hear and pass upon the claims as if presented for the first time, Mr. Liddle, chairman, reviewed the authorities and delivered the following opinion of the commission:

"All things considered, we are led to the conclusion that the original claims submitted stand before us with respect to the hearing and determination thereof substantially as they stood before the former commission, with the difference indicated in article 5, as to additional evidence; that we are engaged in a 'rehearing' (art. 8) of said claims, and not in a 'review' of the former adjudications or awards pertaining thereto; and that in our considerations we can not 'concede' to such adjudications or awards 'force and legal effect.'

"There remain, as before suggested, in each case the fact of the former adjustment; also the opinions pertaining to it. Whatever light these may give will, of course, be availed of. The action of the former commission, like any authority consulted, will have such consideration as it is thought entitled to."

The commission adjourned September 2, 1890. The results of its labors were very completely analyzed and summarized in a report of the secretary which bears date September 10, 1890. By a comparison of the awards of the two commissions, it appears that of the twenty-five claims disallowed or dismissed by the old commission, all but three were disallowed or dismissed by the new; but in these three cases awards were made, respectively, of \$3,206.10, \$20,000, and \$392,489.06, amounting in all to the sum of \$415,695.16. On the other hand, of the twenty-four awards made in favor of claimants by the old commission, fifteen were wholly annulled by the new, while the remaining nine were materially modified.

(Extracted and condensed from Moore: *International Arbitrations*, vol. II, pp. 1659-92.)

(c) **Fraudulent claim**

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THE WEIL AND LA ABRA CASES (1868-1902)

ON July 4, 1868, the United States and Mexico concluded a convention for the adjustment of all claims of the citizens of either country against the government of the other which had been presented to either government for its interposition with the other since February 2, 1848 (date of the peace treaty of Guadalupe Hidalgo), and which remained unsettled, as well as any other claims which might be presented within a specified time.

Several hundred claims were decided and awards amounting to more than four million dollars made.

Of the whole sum awarded against Mexico more than one-fourth was allowed on two claims, those of Benjamin Weil, No. 447, American docket, and La Abra Silver Mining Company, No. 489. The amount awarded in favor of Weil was \$487,810.68 in Mexican gold, or according to the protocol of January 31, 1878, \$479,975.95 in gold coin of the United States; the amount awarded in favor of La Abra Company was \$683,041.32 in Mexican gold, or \$672,070.99 in gold coin of the United States. The two awards aggregated in the gold coin of the United States the sum of \$1,152,046.94.

The claim of Weil, who was a naturalized citizen of the United States, of French nativity, was for damages for the seizure of cotton. In his memorial he alleged that in September, 1864, he imported into Mexico a large train of carts containing about 1,914 bales of cotton, and that the cotton was seized on the 20th of that month between Laredo and Piedras Negras, and appropriated by General Cortina, of the Mexican Liberal forces.<sup>1</sup> For this alleged wrong he claimed \$334,950 in gold, with interest from September 30, 1864, at the rate of 12 per cent. The evidence accompanying his memorial consisted of an affidavit made by him-

<sup>1</sup> Perhaps the most remarkable feature of this Weil claim is that the Government of the United States should have been willing to allow for presentation a claim for alleged losses incurred in a transaction in violation of the prohibition against the export of cotton from the Confederate States. Of course, as far as concerned the application of the rules of international law, Mexico would have been equally responsible.

self in New Orleans in September, 1869, and of affidavits made by certain other persons from time to time from 1869 to 1872.

Upon the disagreement of the commissioners of Mexico and the United States, the umpire, Sir Edward Thornton, made awards in favor of these two claims.

After the commission had concluded its labors and published its awards, the Mexican Minister in a note of December 4, 1876, transmitted to Secretary Fish the following reservation of the Mexican agent in regard to the above-mentioned awards: "The Mexican Government, in fulfillment of article 5 of the convention of July 4, 1868, considers the result of the proceedings of this commission as a full, perfect, and final settlement of all claims referred to in said convention, reserving, nevertheless, the right to show at some future time, and before the proper authority of the United States, that the claims of Benjamin Weil (No. 447) and La Abra Silver Mining Company (No. 489) both on the American docket, are fraudulent and based on affidavits of perjured witnesses; this with a view of appealing to the sentiments of justice and equity of the United States Government, in order that the awards made in favor of the claimants should be set aside."

Mr. Fish in reply "declined" to "entertain the consideration of any question which may contemplate any violation of or departure from the provisions of the convention as to the final and binding nature of the awards, or to pass upon, or by silence to be considered as acquiescing in, any attempt to determine the effect of any particular award."

To this the Mexican Minister, Mr. Mariscal, made rejoinder that the agent representing the Mexican Government had only expressed "the possibility" that the Mexican Government might "at some future time have recourse to some proper authority of the United States to prove that the two claims he mentioned were based on perjury, with a view that the sentiments of equity of the Government of the United States, once convinced that frauds" had "actually been committed," would "prevent the definite triumph of these frauds."

Across the remaining years of the century these claims drew their slimy trails.



In fulfillment of the Act of Congress of June 18, 1878, which requested the President to investigate the charges of fraud in the cases of Benjamin Weil and La Abra Silver Mining Company, Secretary of State Evarts advised that "the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud." Laboring under misapprehension in regard to the La Abra case, Mr. Evarts expressed the opinion that "as the main imputation in the case of La Abra Silver Mining Company is of fraudulent exaggeration of the claim in its measure of damages, it may consist with a proper reservation of further investigation in this case to make the distribution of the installments in hand."

A bill referring the matter to the Court of Claims for investigation having failed of passage, the Mexican Minister informed Mr. Evarts July 30, 1880, that the lawyers employed by Mexico in Washington had thought proper to take certain measures before the courts of the District of Columbia against the promoters of the Weil and La Abra claims. But Mr. Evarts replied that the proposed step was regarded as a distinct departure from the attitude previously taken by Mexico, and as a contradiction of the purpose of the fifth article of the Convention of 1868, which absolutely forbade any attempt on the part of Mexico to obstruct the execution of the awards. The Mexican Government proceeded no further in the matter.

After these distributions on the La Abra claim of \$240,683.06 and on the Weil claim of \$171,889.64 were made, when Mr. Arthur became President, all further distributions on the awards in question were suspended, and negotiations were opened with Mexico for an international rehearing.<sup>1</sup> To this end a convention was signed at Washington July 13, 1882, but it failed of ratification after pending before the Senate nearly four years.

While the convention was pending in the Senate, John J. Key,

<sup>1</sup> On December 9, 1881, Mr. Blaine, being still Secretary of State, in a note to Mr. Zamacona, enclosing a report of a secret agent of the Treasury bearing on the Weil claim, observed: "Permit me to say that this government can have no less moral interest than that of Mexico in probing any allegation of fraud whereby the good faith of both in a common transaction may have been imposed upon."

one of Weil's original attorneys, applied, as assignee of a part of the award, to the Supreme Court of the District of Columbia for a writ of mandamus to compel Mr. Frelinghuysen, as Secretary of State, to distribute the installment then in his hands. In due course the case came before the Supreme Court of the United States, by which the proceeding was, on January 7, 1884, dismissed.

On June 11, 1886, Mr. Morgan, from the Committee on Foreign Relations, submitted to the Senate a report, accompanied with a bill to provide for a judicial investigation of the charges of fraud. The report discussed very fully the questions of law relating to the reëxamination of the claims, and expressed the opinion that the claim of Weil had "no actual foundation in fact; that it was originated in fraud and was established by false swearing."

The question of providing for a judicial investigation of the awards continued to be the subject of discussion in Congress, and various reports were submitted. On December 21, 1887, the Senate requested the production of any correspondence with the Mexican Government in relation to the claims since January, 1886, together with a statement of what sums had been paid on them by Mexico and what sums had been distributed. In response to this resolution the President communicated to the Senate March 5, 1888, a report of Mr. Bayard, as Secretary of State, to which were annexed various documents. Mr. Bayard said: "The sole question now presented for the decision of this government is whether the United States will enforce an award upon which the gravest doubts have been cast by its own officers in opinions rendered under express legislative direction, until some competent investigation shall have shown such doubts to be unfounded, or until that branch of the government competent to provide for such investigation shall have decided that there is no ground therefor."

Mr. Bayard also argued, on the strength of the cases of Atocha and Gardiner, the two awards under the convention with China of 1858, the case of the *Caroline*, and the opinion of the Supreme Court in the case of *Frelinghuysen v. Key*, that "the duty of the government to refuse to enforce an inequitable and unconscionable award," had been "repeatedly maintained in the most au-

thoritative manner." He also disclosed the fact that he had sought to obtain a judicial investigation of the Weil and La Abra awards without awaiting further Congressional action. By section 12 of the act of March 3, 1887, in relation to suits against the Government of the United States, it is provided that when any claim or matter pending in any of the executive departments involves controverted questions of fact or of law, the head of such department may, with the consent of the claimant, submit it to the Court of Claims for decision. Mr. Bayard stated that, being desirous to avoid delay, he had sought the consent of the claimants to such a submission, but that the attorneys had, in behalf of their clients, declined the proffered investigation. In conclusion, he suggested that a recommendation be made to Congress to provide expressly for the reference of the claims to the Court of Claims, or such other court as might be deemed proper, in order that a competent investigation of the charges of fraud might be made.

When Mr. Blaine again became Secretary of State, in March, 1889, he adhered to the course of his two immediate predecessors in refusing to distribute the moneys on hand applicable to the two awards in question. In consequence, Sylvanus C. Boynton, as assignee of a part of the Weil claim, on November 23, 1889, filed a petition in the Supreme Court of the District of Columbia against Mr. Blaine as Secretary of State to compel him to make a distribution. In due course the case came before the Supreme Court of the United States, and on March 23, 1891, the decree of the court below dismissing the petition was affirmed.

In December, 1892, acts were at length passed by Congress conferring jurisdiction on the Court of Claims to investigate both the Weil and La Abra cases, and to determine whether the charges of fraud were well founded.

On March 28, 1900, Secretary of State Hay sent the following note to the Mexican Ambassador in reference to the La Abra claim:

"As you are advised, the Congress of the United States, acting upon the recommendation of this Department, passed an act which took effect December 28, 1892, authorizing and directing the Attorney-General to bring a suit in the Court of Claims against

La Abra Silver Mining Company to determine whether the award made by the United States and Mexican mixed commission in respect to the claim of the said La Abra Company was obtained by fraud; and in case it should be so determined, to bar and foreclose all claims in law or equity on the part of said company, its representatives and assigns, to the money received from the Republic of Mexico on account of such award.

"In accordance with the terms of the Act of Congress of 1892, the Attorney-General brought suit in the name of the United States against said La Abra Company, and, after a patient and careful hearing of the case, the Court of Claims decided that the award made by the mixed commission was obtained by fraud, and a decree was rendered barring and foreclosing all claim on the part of said company, its agents, attorneys, or assigns, to the money received from the Republic of Mexico on account of said award; and, on an appeal being taken to the Supreme Court of the United States, this latter tribunal affirmed in full the decision of the Court of Claims.

"Of the sum paid by the Government of Mexico on account of La Abra award, it appears that there is remaining under the control of this Department \$403,030.08, which, in accordance with the legislative and judicial proceedings above cited, it is now within my power to return to the Government of Mexico. Acting under the direction of the President, and in pursuance of the spirit of equity and fair dealing which controls the conduct of this government in its relations with the neighboring republics, it is now my very agreeable duty to inclose to you herewith a check for the amount above named drawn upon the assistant treasurer of the United States at New York and made payable to your order."

In acknowledging the receipt of this note the Mexican Ambassador said: "I hasten to express to Your Excellency my most sincere recognition of the high principles of justice and equity which have guided the Government of the United States in returning to Mexico the aforesaid sum so soon as the obstacles to such action were removed. I do not doubt that my government, on receiving this agreeable intelligence, will see in this act a new proof of the friendly spirit with which the illustrious Chief Magis-

trate of this country and your excellency personally cultivate the pacific relations happily existing between our two Republics upon the basis of honor, morality, and benevolence, with the wise co-operation of the legislative and judicial branches, which is illustrated particularly in the act of exemplary probity to which I have just referred, and for which to a singular degree the Mexican people will always be grateful."

On November 10, 1900, Mr. Hay transmitted to the Mexican Ambassador a check for \$287,833.77, the unpaid balance of the award in favor of Benjamin Weil.

The Urgent Deficiencies Bill, approved by President Roosevelt February 14, 1902, contained the following item: "For repaying to the Government of Mexico money erroneously claimed by and paid to the United States on account of the awards, adjudged to have been fraudulently made, in the La Abra and Weil claims, four hundred and twelve thousand five hundred and seventy-two dollars and seventy cents."

(Condensed and extracted from Moore: *International Arbitrations*, vol. II, pp. 1324-48; *Foreign Relations of the United States*, 1900, pp. 781-84; *United States Statutes at Large*, vol. 32, pt. 1, p. 5.)

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(d) Excess of power

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## THE NORTHEASTERN BOUNDARY OF THE UNITED STATES (1831)

UNDER the convention between the United States and Great Britain of September 29, 1827, the King of the Netherlands was chosen as arbitrator to determine the true divisional line between the northeastern part of the United States and the adjacent British possessions under the treaty of peace of 1782-83. The King of the Netherlands, in his award given at The Hague, January 10, 1831, held that neither the line claimed by the United States nor that claimed by Great Britain so nearly answered the requirements of the treaty that a preference could be given to the one over the other; and abandoning, therefore, as impracticable, the attempt

to draw the line described in the treaty, he recommended a line of convenience. When the award was delivered, the agent of the United States entered a respectful protest against it as constituting a departure from the powers delegated to the arbitrator by the high contracting parties. The British Government also recognized the fact that the award was recommendatory rather than decisive, and, while signifying its readiness to acquiesce in the recommendation, authorized its Minister at Washington privately to intimate that it would not consider the formal acceptance of the award by the two governments as precluding modifications of the line by mutual exchange and concession. President Jackson was inclined to accept the award, and, it seems, afterwards regretted that he had not done so. But, as it was unsatisfactory both to Maine and to Massachusetts, he submitted the question of acceptance or rejection to the Senate, which, by a vote of 35 to 8, resolved that the award was not obligatory, and advised the President to open a new negotiation with Great Britain for the ascertainment of the line. The British Government promised to enter upon negotiations in a friendly spirit, and it was agreed that both sides should meanwhile refrain from exercising jurisdiction beyond the territories which they actually occupied. The boundary was settled by the Webster-Ashburton Treaty of August 9, 1842.

(Extract from Moore: *Digest of International Law*, vol. VII, pp. 59-60; see also Moore: *International Arbitrations*, vol. I, pp. 85-161.)

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(e) Essential error

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### THE PELLETIER CLAIM (1884-87)

By a protocol signed at Washington May 24, 1884, by Mr. Frelinghuysen, Secretary of State of the United States, and Mr. Preston, Envoy Extraordinary and Minister Plenipotentiary of Hayti, the Governments of the United States and Hayti agreed to refer the claims of Antonio Pelletier and A. H. Lazare, citizens of the United States, against the Republic of Hayti, to the Hon-

orable William Strong, formerly a justice of the Supreme Court of the United States, as sole arbitrator.

Though the claims were thus referred together, they were not otherwise connected. They differed both in origin, in character, and in ownership. The grounds on which they rested were summarily stated in the protocol. Those in the case of Pelletier were described as follows:

"That Pelletier was master of the bark *William*, which vessel entered Fort Liberté about the date claimed (31st of March 1861); that the master and crew were arrested and tried on a charge of piracy and attempt at slave trading; that Pelletier, the master, was sentenced to be shot, and the mate and other members of the crew to various terms of imprisonment; that the Supreme Court of Hayti reversed the judgment as to Pelletier, and sent the case to the court at Cape Haytien, where he was retried and sentenced to five years' imprisonment; and that the vessel, with her tackle, was sold, and the proceeds divided between the Haytian Government and the party who, claiming to have suffered by her acts, proceeded against the vessel in a Haytian tribunal."

The arbitrator on June 20, 1885, transmitted to Mr. Bayard, then Secretary of State, his awards on both the claims submitted to him.

November 18, 1886, the Haytian Minister filed a formal protest in which he maintained that the award in the case of Pelletier was induced by a clear mistake by the arbitrator as to his jurisdiction under the protocol.

December 8, 1886, a resolution was adopted by the Senate, requesting the President to communicate to that body, "if not inconsistent with the public interests, copies of the awards made by the arbitrator in the case of Antonio Pelletier and in the case of A. H. Lazare against the Republic of Hayti, under a protocol made by and between the Secretary of State of the United States and the Minister Plenipotentiary for the Republic of Hayti, dated 24th May, 1884, together with such action as may have been had in relation thereto." This resolution was referred to the Secretary of State, Mr. Bayard, who, on January 20, 1887, submitted to the President a report, which the latter communicated to the Senate, holding that neither the award in the case of Pelletier nor

that in the case of Lazare should be enforced. The reasons for this conclusion were set forth, those in the case of Pelletier being stated first.

Mr. Bayard stated that the case of Pelletier was first brought to the attention of the Department of State by a dispatch dated April 13, 1861, from Mr. G. E. Hubbard, commercial agent of the United States at Cape Haytien, who reported that Pelletier was under arrest in Hayti on the charge of attempted enslavement in Haytian waters of Haytian citizens. Mr. Seward, then Secretary of State, after a prolonged correspondence, finally refused, on November 30, 1863, to interfere with the action of Hayti in the matter, taking the position, in an instruction to Mr. Whidden, then United States Commissioner in Hayti, that "his [Pelletier's] conduct in Hayti and on its coasts is conceived to have afforded the reasonable ground of suspicion against him on the part of the authorities of that republic which led to his arrest, trial, and conviction in the regular course of law, with which result it is not deemed expedient to interfere."

Mr. Bayard further stated that early in 1864 Pelletier escaped from Hayti, and on July 16 of that year presented to the Department of State a long memorial. This memorial, with other papers in the case, was sent to the House of Representatives, in compliance with a resolution of that body, on April 3, 1868. No further action was taken upon it by the Department of State, nor was further action taken upon it by the House. In 1871 Pelletier made another application to the Department of State, with the result that he was informed by Mr. Bancroft Davis, Acting Secretary, September 26, 1871, that the Department had "found no reason to dissent from the opinion of Mr. Seward in regard to the case in his instruction to Mr. Whidden, United States Minister to Hayti, of the 30th of November, 1863." Pelletier next applied to the Senate, where his case was referred to the Committee on Foreign Relations. On June 9, 1874, Mr. McCreery presented from that committee a unanimous report sustaining the views of Mr. Seward. In this report the opinion was expressed, after an examination of the facts, that if, as the claimant contended, the Haytian courts had no jurisdiction of the charges against him, the citizens of Hayti might "be said to hold their lives, their persons, and their



property at the mercy of any corsair who may choose to deprive them of either." The claimant then applied once more to the House of Representatives, securing the presentation to that body on January 11, 1878, of a further memorial and documents; but a resolution was adopted by which the House declined to make any recommendation in regard to the claim.

Having thus detailed Pelletier's failures to obtain favorable action by the Executive or by Congress upon his claim, Mr. Bayard stated that the claimant on January 22, 1878, again appeared before the Department of State "with a series of *ex parte* statements which were referred to Mr. O'Connor, then examiner of claims," who made two reports, one on February 9, 1878, and the other on March 29, 1878, in the latter of which he maintained that there was ground for a demand on Hayti for redress. On the basis of this report instructions were sent to Mr. Langston, then Minister to Hayti, who, in presenting the matter, declared that he was instructed to propose "a prompt and impartial arbitration" of the claim, and to state that in default of such an arrangement the Government of the United States would "require its satisfaction." "Under this pressure," said Mr. Bayard, "the Government of Hayti, which had at first peremptorily refused to arbitrate, ultimately consented to an arbitration."

Mr. Bayard then referred to the remonstrance of Hayti of November 18, 1886, against the execution of the award, and, after narrating the circumstances in which the claim originated, cited Judge Strong's declaration as arbitrator that the voyage of the bark *William* was, in his opinion, "illegal;" that "its paramount purpose was to obtain a cargo of negroes, either by purchase or kidnapping, and bring them into slavery in the State of Louisiana;" and that, "beyond doubt," "had the bark been captured and brought into an American port, when she was seized at Fort Liberté, she would have been condemned by the United States courts as an intended slaver." Upon the facts, as established in the record and admitted in these declarations of the arbitrator, Mr. Bayard stated that he was constrained to come, on the question of Hayti's jurisdiction, "to a conclusion in direct conflict with that reached by the learned arbitrator." In this relation Mr. Bayard maintained (1) that Pelletier, as held by the Haytian courts, by

the Senate Committee on Foreign Relations in 1874, and by Judge Strong in 1885, visited Hayti in 1861 for the purpose of abducting and enslaving Haytian citizens; (2) that he made, when in Haytian waters, such preparations for carrying out this plan as would, if he had not been arrested, have ended in its accomplishment; (3) that such action on his part in Haytian waters constituted, both by the common law and by the French law in force in Hayti, a criminal attempt, subject to public prosecution; (4) that the attempt thus made was within Haytian jurisdiction; and (5) that the trial was, so far as could be learned, decorous and fair, and that the punishment ultimately imposed was, in view of the atrocity of the offense, singularly lenient.

Mr. Bayard cited authorities, analyzed the four constituents of a criminal attempt, and discussed the jurisdiction of Hayti to punish such offenses in her waters.

Having thus discussed the question of jurisdiction, Mr. Bayard proceeded to point out that the arbitrator, while proclaiming in the strongest terms the turpitude of the claimant's conduct, appeared, in consequence of an erroneous construction of the protocol, to have considered himself bound to make an award in his favor.

From the record of the oral arguments it appears that the arbitrator considered (1) that, as a claim had been made, he was restricted to the decision of a pure question of law; and (2) that the protocol, by requiring him to decide "according to the rules of international law existing at the time of the transactions complained of," restricted him to the decision of the sole question whether Pelletier had been guilty of piracy by law of nations, as distinguished from piracy by municipal statute, and compelled him to award damages in case he should find that piracy by law of nations had not been committed. Mr. Bayard, on the other hand, maintained that the protocol was not designed in any way to limit the arbitrator's inquiries into the merits of the claim before him, but was intended "merely to insure the investigation of those merits upon principles of international law contemporaneous with the alleged wrongs, undoubtedly the true test of Hayti's liability." Mr. Bayard was "unable to see why the fact that the Government of the United States had made a reclamation in Pelletier's

behalf excluded consideration of the question whether that government 'ought to have made a reclamation in his behalf.'" In his opinion the question of "legal right" was "vitally connected with the question whether a reclamation ought to have been made," since both those questions involved the application of the rules of international law to the facts of the case. Those facts were to be ascertained by the arbitrator. The Government of the United States, in submitting the claim to arbitration, had acted on a *prima facie* case, and one of the expressed objects of submission was to obtain a full investigation of the facts. The previous action of the government on *ex parte* information should not be regarded as a prejudgment of the case submitted. Nor was there anything in the protocol that prevented the consideration of the question whether Pelletier was guilty of piracy under the Haytian statute. "If the bark," said Mr. Bayard, "when she entered the harbor of Fort Liberté, within the unquestioned territorial jurisdiction of Hayti, loaded with the implements of her nefarious errand, and, as the evidence led the arbitrator to conclude, intending there to consummate her unlawful enterprise, could have been condemned by the courts of the United States as an intended slaver, why could not the Haytian court condemn her and try and imprison her commander on the same ground, if, as is not questioned, Haytian law made provision therefor? It matters not what the Haytian law may have called the offense, whether it described it as piracy, or as attempted piracy, or as attempted slave trading, or whether, as is the case, it punished attempted slave trading within Haytian jurisdiction as piracy. . . . It was a rule of international law in 1861, and is a rule of that law now, that offenses committed in the territorial jurisdiction of a nation may be tried and punished there, according to the definitions and penalties of its municipal law, which becomes for the particular purpose the international law of the case. It matters not what the offense may be termed if it appear that a violation of the municipal law was committed and punished. The municipal law of Hayti is not alone in defining the slave trade as piracy. It is so denominated by the laws of the United States (Revised Statutes, sec. 5376), and is punishable with death; and if the Government of the United States, like that of Hayti, were to make attempts at slave trading equivalent to the

consummated act and equally punishable therewith, it is not supposed that the rules of international law would thereby be violated. I cannot presume that the Government of the United States by stipulating for the decision of the Pelletier claim according to the rules of international law existing in 1861 intended to deny to Hayti the right at that time to execute within her territorial jurisdiction her laws against slave trading or piracy therein attempted, and I am compelled to declare that had such been this government's expressed intention I could not recommend that it should now be executed in the light of the facts developed in the arbitration."

Mr. Bayard further maintained (1) that it was the duty of the Executive to refuse to enforce an unconscionable award; (2) that, assuming the claimant's naturalization to be proved, his right, being a tort-feasor, to claim compensation for the consequences of this tort must be denied; (3) that, upon the general question of turpitude, the claim was one that could not be pressed by the United States "either as a matter of honor or as a matter of law;" (4) that the principle that a sovereign could not in honor press an unconscionable and unjust award, even though it was made by an international tribunal invested by law or treaty with the power of swearing witnesses and receiving or rejecting testimony, applied with still greater force to the award of an arbitrator whose acts in administering oaths to witnesses, issuing commissions, and determining what questions were to be put, must, if sanctioned only by the Executive, be regarded as *ultra vires*.

Mr. Bayard then remarks: "In view of the position taken by Hayti, as exhibited in the records of this case, it becomes now incumbent on the Government of the United States to determine whether it will enforce the payment by Hayti of this award," and concludes: "But I do not hesitate to say that, in my judgment, the claim of Pelletier is one which this government should not press on Hayti, either by persuasion or by force, and I come to this conclusion, first, because Hayti had jurisdiction to inflict on him the very punishment of which he complains, such punishment being in no way excessive in view of the heinousness of the offense, and, secondly, because his cause is of itself so saturated with turpitude and infamy that on it no action, judicial or diplomatic, can be based."

A copy of the executive document containing the foregoing report was sent to Mr. Thompson, then Minister of the United States at Port au Prince, for his information. Subsequently, Mr. Thompson enclosed to the Department of State an extract from a message to the National Assembly of Hayti, published in *Le Moniteur* of May 12, 1887, in which President Salomon quoted several passages from the report, commented upon the "spirit of justice" which they manifested, and declared that Hayti stood, in respect of the claims in question, "disengaged from all responsibilities." He declared that he would like to see the report in the hands of every Haytian, and that orders had been given for its translation and the printing of a large number of copies.

(Extracted and condensed from Moore: *International Arbitrations*, vol. II, pp. 1749-1805; *Foreign Relations of the United States*, 1887, pp. 591-630.)

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## THE ORINOCO STEAMSHIP COMPANY CASE

*The Permanent Court of Arbitration at The Hague, 1910*

THE parties to this case were the United States of America and the United States of Venezuela, and the issue was the revisability of an award previously rendered by an international commission. The same principle had been involved in the Pious Fund case, but now the American position was reversed. In the former case the United States contended for the doctrine of *res judicata* on the ground that the original award had been rendered within the limits of the jurisdiction of the commission; in the present case, it was maintained that, in an arbitration of the matter at issue in 1904, there had been an excess of jurisdiction as well as essential error, and that for these reasons the award should be set aside and the case taken up *de novo*.

The circumstances of the original award and the facts out of which the case grew were as follows:

By a protocol of February 17, 1903, the United States and Venezuela agreed to refer to a mixed commission for determination "all claims owned by citizens of the United States of America." All awards were to be on "a basis of absolute equity, without

regard to objections of a technical nature, or of the provisions of local legislation." The decision in each case was to be final and "conclusive" and payments were to be in gold of the United States.

Among the claims submitted to the commission was that of the Orinoco Steamship Company, a New Jersey corporation, which had taken over all the rights and liabilities of the Orinoco Shipping and Trading Company, the shareholders of which had almost all been American citizens, though the company itself had been under nominal British registry. The claims against Venezuela had in reality been acquired by the latter company, but inasmuch as they were now owned by American citizens, they came within the scope of the commission. The origin of the claims is to be sought in the disturbed economic and political conditions obtaining in Venezuela for many years. Among the most valuable of the concessions in the gift of successive governments was the privilege of the exclusive navigation of the Orinoco. This had been the object of much political manipulation, and, by reason of frequent changes of policy with respect to opening and closing the river to foreign trade, contracts had been set aside and much litigation had ensued.

Omitting details, the claims of the Orinoco Steamship Company arose from its succession, through various business changes, to the ownership of two contracts, the Oleachea contract of 1891 and the Grell contract of 1894. Under the former, the Oleachea Company had secured the exclusive navigation of the Upper Orinoco for the term of twenty years and later had become the creditor of the Venezuelan Government by reason of assistance given in times of revolution. The Grell contract had established coastwise trade down the Orinoco from Ciudad Bolivar to Maracaibo and had granted to the concessionaire, Ellis Grell, the exclusive privilege of such trade, and had even extended to him the temporary privilege of navigation between Orinoco ports and the island of Trinidad, notwithstanding the decree of July 1, 1893, closing the Macareo and Pedernales channels of the Orinoco to foreign trade. This contract was to run for fifteen years.

In 1900 the Orinoco Shipping and Trading Company, which by this time was the owner of both contracts, began to press the Vene-

zuelan Government for payment of claims arising out of civil war and otherwise, with the result that on May 10 the government agreed to extend the Grell contract six years, and the company agreed, in full discharge of all indebtedness, to accept a payment of 100,000 bolivars down and a similar payment to be made at a later date. Both the original contract of 1894 and the revised contract of 1900 contained the Calvo clause, so called, to the effect that,

"Questions and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the Republic in accordance with its laws, and shall not in any case give occasion for international reclamations."

The new contract was broken from the beginning. The second payment of 100,000 bolivars was never made; the navigation of the Orinoco was freed from the restrictions of the decree of July 1, 1893, thereby rendering valueless the concession of the Grell contract, while, by the resolution of December 14, 1901, the contract itself was annulled and the company deprived of all its privileges. Early in 1902 the company was reorganized as the Orinoco Steamship Company, wholly American-owned, and the transfer duly registered in Venezuela. But, as a result of the hostility of the Venezuelan Government, it was compelled to sell out at a great sacrifice to a Venezuelan firm which had the especial favor of the government and in which President Castro was said to be a stockholder. Shortly after the sale, one Curao secured a concession of navigation rights similar to that of the Grell contract, and in course of time transferred it to the Venezuelan firm, the contract to run for fifteen years.

The claim submitted by the United States before the mixed commission on behalf of the Orinoco Steamship Company was as follows:

- (1) \$1,209,700 for annulment of the Grell contract of 1894 and 1900.
- (2) 100,000 bolivars (\$19,200) due from the Venezuelan Government and promised May, 1900.
- (3) \$149,698 for damages sustained in revolutions, together with cost of services rendered the Venezuelan Government.

- (4) \$25,000 for counsel fees and expenses incurred in prosecuting the claims.

Failing a decision by the commission, the claim was referred to the umpire, Dr. Barge, of the Netherlands, who disallowed the larger part of it. The contract, in his opinion, did not contemplate a concession for the exclusive navigation of the two channels. It was not "the right to navigate," but "the right of a coastal vessel," that constituted the benefit and exemption. This privilege was not affected by reopening the Orinoco, hence no damage had been sustained. Besides, the Calvo clause operated against any such claim, as well as the failure to give previous notice of transfer in accordance with Venezuelan law. These two latter reasons also invalidated the indebtedness of the government to the company. As for damages claimed because of civil disturbances, the umpire had awarded only \$28,000, no allowance having been made for loss of revenue due to the blockade of the Orinoco, as the government was within its rights in instituting it. Inasmuch as the greater part of the claim was thus disallowed, the umpire refused to grant counsel fees and expenses. Thus, of a claim amounting to over \$1,400,000, Dr. Barge had awarded only \$28,224.93.

The United States protested the award and during the régime of Castro made it and other American claims the subject of diplomatic negotiation. The United States asked that they go to The Hague for settlement, but Castro refused to agree. The new Venezuelan Government, however, was more amenable to discussion, and two of the outstanding claims were settled through diplomacy. On February 13, 1909, a protocol was drawn up by the United States and Venezuela, providing for the submission of the remaining claims to the Permanent Court of Arbitration, but two of these were soon afterwards settled by direct negotiation, leaving only the Orinoco Steamship Company award outstanding.

The arbitral tribunal, as constituted by the protocol, consisted of three members, none of whom was a national of either party. No member of the Permanent Court could appear as counsel in the case. Definite dates were fixed for the exchange of cases and counter-cases, and oral arguments and replies were made before



the tribunal after its meeting on September 28, 1910. The United States appointed as arbitrator, Señor Gonzalo de Quesada, Cuban Minister to Germany, Venezuela appointed M. Beernaert, of Belgium, and these selected as a third member of the tribunal, M. Lammasch, of Austria, who presided.

The questions submitted to the tribunal were as follows:

"The arbitral tribunal shall first decide whether the decision of Umpire Barge, in this case, in view of all the circumstances and under the principles of international law, is not void, and whether it must be considered to be so conclusive as to preclude a reëxamination of the case on its merits. If the arbitral tribunal decides that said decision must be considered final, the case will be considered by the United States of America as closed; but on the other hand, if the arbitral tribunal decides that said decision of Umpire Barge should not be considered as final, the said Tribunal shall then hear, examine and determine the case and render its decision on its merits."

The United States, in its arguments before the tribunal, maintained that these two questions could not be treated separately. To show the necessity for revision, it would be necessary to traverse the facts of the case itself, though it agreed with Venezuela that there was no need to pass upon the second point until the first had been decided. But the United States further contended that, if the tribunal decided that the award was open to revision, it was to hear and decide the entire case as it came before Dr. Barge; in other words, the award was not severable; if it was infected in any of its parts with illegality, the whole case must be examined and determined anew.

In its contention for a revision of the award, the United States admitted fully the force of *res judicata*, but held it applicable only when there had been no overstepping of the limits of jurisdiction on the part of the arbitrator. It admitted also that mere error in appreciation of facts or in judgment is not a ground for revision. Conceding these points, it proceeded to examine the chief reasons assigned by publicists to uphold revision of awards. Comparative citations showed that the authorities are unanimous that an evident disregard of the terms of the *compromis* invalidates an international award. Further, the great weight of authority would as-

sign essential error as sufficient ground for revision, essential error, according to the argument of the United States, being tantamount to a denial of justice. Precedent also supported this right to go behind an arbitral award. The Pelletier case in Hayti, where the arbitrator did not give full effect to provisions of local law, as required by the empowering protocol, and the boundary award of 1827, where the King of the Netherlands had gone outside of the treaty of 1783 and had drawn an arbitrary boundary of his own, were instances in point. Venezuela itself had exercised this right in the case of awards of the mixed commission in 1866, and again in 1885. The reason for such a right is obvious: revision is fundamental in the conception of arbitration as a judicial remedy. A judgment must conform to the principles of law and equity involved, and, when such have not prevailed, there should be opportunity for revision. "Arbitration is an instrument of peace only because it is an instrument of justice." In the present case the umpire had been mistaken in his interpretation of the nature of the company's concession, stating it to be one thing, when it was in reality something else. Besides, he had applied the Calvo clause and local technical law in clear disregard of the Protocol of 1903. For these reasons, the United States argued, the tribunal should revise his award.

Venezuela, in reply, took certain objections at the outset. The United States had not made its protest in reasonable time. The revision of this award would affect other awards made under the Protocol of 1903. The latter had distinctly stated that all awards under it were to be "final and conclusive," and hence not to be reopened. The main contentions of the United States were met by the argument that the words "absolute equity" in the Protocol of 1903 had conferred upon Dr. Barge discretionary powers and hence had freed him from any technical limitations in the terms of submission; while "essential error" to justify revision, must be based upon false evidence only, and this had not been present in the case. Hence Venezuela asked the tribunal to apply the doctrine of *res judicata* and dismiss the appeal for revision.

In its award, which was rendered October 25, 1910, the tribunal, while endorsing the principle that arbitral decisions should in general be accepted as final, recognized, as here, the occasional

desirability of review. As both parties were in substantial agreement as to what defects invalidated an arbitral decision, it remained only to discover whether any of these defects had been present in the award under consideration. The tribunal considered that the original award had consisted of distinct decisions on separate claims, and that therefore "the nullity of one is without influence on any of the others, more especially when, as in the present case, the integrity and the good faith of the arbitrator are not questioned." Hence the principle of severability was admitted and the tribunal proceeded to examine each claim separately. On this view of it, the greater part of the award was held to contain no ground for annulment; "the appreciation of the facts of the case and the interpretation of the documents were within the competence of the umpire, and his decisions, when based on such interpretation, . . . not subject to revision." That is, the umpire's interpretation of the nature of the Grell contract was not vitiated even though his decision had been partly based on objections of a technical character. However, in the opinion of the tribunal, the application of the latter to the debt of 100,000 bolivars rendered this part of the award void, and the tribunal awarded this sum in full. Some other amounts claimed were also awarded for the same reason, and, as the total damages thus obtained by the company were considerably increased, the tribunal granted counsel fees on the basis of equity to the extent of \$7,000. In all, the total amount awarded by the tribunal, inclusive of interest, was over \$64,000 in excess of the Barge award.

Thus the award was, in part, set aside on the ground of failure to conform with the terms of the defining protocol. "The all-important thing about the decision," says one commentator, "is that for the first time an international award has been annulled by an international tribunal. . . . It is believed that it may fairly be said to have decided that departure from the terms of the protocol is a just ground for annulling an international award and furthermore that disregard of the rules of law enjoined by the terms of submission amounts to a departure from the submission."<sup>1</sup>

(*Case, Counter-case, and Appendix*, published by the Govern-

<sup>1</sup> W. C. Dennis (Agent for the United States in the case) in *American Journal of International Law*, vol. v, p. 54.

ment Printing Office, Washington; *Protocoles de Séances du Tribunal*, published by the International Bureau at The Hague; *American Journal of International Law* [1911], vol. v, pp. 32-65, 230-35; Printed *Arguments* of the parties before the Arbitral Tribunal; G. G. Wilson, *The Hague Arbitration Cases.*)

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(f) New evidence

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### THE LAZARE CLAIM (1884-87)

THE claim of A. H. Lazare was, by the terms of the protocol of May 24, 1884, referred with that of Antonio Pelletier to the Honorable William Strong, formerly a justice of the Supreme Court of the United States, as sole arbitrator. The grounds of the claim of A. H. Lazare were described in the protocol as follows: "That Lazare entered into a written contract with the Haytian Government September 23, 1874, for the establishment of a national bank at Port au Prince, with branches, the capital being fixed first at \$3,000,000, and afterward reduced to \$1,500,000, of which capital the Government was to furnish one-third part and Lazare two-thirds; that the bank was to be opened in one year from the date of the contract, and an extension of forty-five days on this time was granted on Lazare's request, and that on the day when the bank was to be opened, the Haytian Government, alleging that Lazare had not fulfilled his part of the engagement, declared, in accordance with the stipulations of article 24 of the agreement, the contract null and void, and forfeited on his, Lazare's, part."

In the case of Lazare, as well as in that of Pelletier, Mr. Bayard reported in favor of opening the award. His recommendation in the Lazare case rested (1) on certain papers in the Department of State which were not shown to have been laid before the arbitrator; (2) on irregularities in the arbitrator's proceedings; (3) on errors in the award; (4) on the alleged newly discovered evidence; and (5) on a letter of Judge Strong to Mr. Preston, the Haytian Minister, of February 18, 1886. The irregularities alleged to exist in the arbitrator's proceedings were the same as those

pointed out in the case of Pelletier, in respect of the swearing of witnesses, the issuing of commissions, and the admission and rejection of testimony. The letter of Judge Strong to Mr. Preston related to the "newly discovered" evidence. In that letter Judge Strong stated that, after his functions as arbitrator had ceased, the newly discovered evidence was laid before him by counsel for Hayti with an application for a rehearing; that he denied the application verbally on the ground that his power over the award was extinct; but that the newly discovered evidence was of such a character that it would "materially have affected" his decision had it been presented to him pending the hearing of the case, and before his powers under the protocol had terminated. The evidence in question tended to show (1) that Lazare was, at the time of his transactions in Hayti, insolvent; (2) that his connections with the steamship and railway business in New York, prior to his going to Hayti, were wholly unremunerative; (3) that the firms with which he negotiated in London, after the failure of Benson & Co., had little or no standing, and were lacking in ability to obtain the money which he required; and (4) that in fact he was wholly unprepared to furnish in any form the funds which he had engaged to provide for the opening of the bank.

After submitting its grounds, the report presented its conclusion adverse to the validity of the claim and to the effect that whenever it was discovered that a claim against a foreign government could not be honorably and honestly pressed, such claim should, no matter what the period of procedure, be dropped.

In the course of these conclusions the report stated that when a copy of Mr. Bassett's dispatch, together with a memorandum of Mr. Lazare's statement of 1877 as to his receipt of the Haytian Government's notice of deposit, was given to Judge Strong, he made, on June 23, 1886, an oral statement to the Department of State as follows: "In view of these documents, which were not exhibited to me, I am clearly of the opinion that the award ought to be opened; that the government cannot afford to press [a] claim not clearly founded in honesty; that if these documents had been presented to me, together with the other affidavits presented to me on the motion to open the award, they would have made a vast difference in the award which I did make. These papers tend

to show that the only fault of Hayti was the failure to propose arbitration instead of at once declaring the contract void, the contract having stated that differences should be referred to arbitrators. That not having been done, resort may be had to law to recover such injuries as the claimant may have sustained. Under the circumstances it would seem to me that he could only claim for expenses necessarily incurred by him."

As a consequence of Secretary Bayard's report the Government of the United States refused to press the claim.

(Extracted and condensed from Moore: *International Arbitrations*, vol. II, pp. 1749-1805.)

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## § 11. COMMISSIONS OF INQUIRY

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### THE DOGGER BANK INCIDENT (1904)

DURING the war with Japan, the Russian Government found it necessary, in the course of its naval operations, to send a fleet from the Baltic to the Far East. While it was being mobilized, vague rumors were afloat that it was to be the object of secret attack by Japanese mines and torpedo-boats, even in the Baltic itself, and it was with feelings of nervousness that the Russians contemplated the passage through the comparatively narrow and enclosed waters of Northwestern Europe. While in the Danish straits they were reported as exhibiting exaggerated suspicion of all merchant craft and in this state of mental tension they entered upon the passage through the North Sea.

On the night of Friday, October 21, 1904, the fifth section of the Russian fleet fell in with a Hull fishing fleet, which was at work trawling on the customary fishing grounds on the Dogger Bank about 220 miles east from the British coast. This section sailed around the trawlers, but the sixth and last section, which came upon the fishermen shortly after midnight, sailed through the fishing fleet. Suddenly, to the astonishment of the trawlers, many of whom were burning "flares," the warships opened fire on them and kept the bombardment up for twenty minutes. At the end of

that time, one trawler, the *Crane*, was sinking, five others were damaged, two men were killed and six wounded. After the firing, the Russian warships sailed away to the southwest, without stopping to ascertain the results of their attack, and were not heard from until the afternoon of the 23d, when they were reported as passing through the Straits of Dover.

When the news of the attack became known, the behavior of the Russian fleet astounded not only Great Britain, but all other nations, including Russia itself. Not only the gravity of the immediate situation was considered, but also the possible danger that menaced neutral commerce if the Russian fleet was to continue its voyage in such a frame of mind. Besides, public opinion in Great Britain was the more easily inflamed because of the alliance with Japan and there was danger that the incident might bring about British participation in the war. Indeed, so serious was the crisis precipitated, that, on the 24th, "preliminary orders for mutual support and coöperation were, as a measure of precaution, issued from the Admiralty to the Mediterranean, Channel, and Home Fleets," and steps were taken to intercept the Russian fleet at Gibraltar, should such extreme action prove necessary.

As soon as the information reached him, the British Ambassador to Russia, acting on his own initiative, asked Count Lamsdorff, the Russian Foreign Minister, for an explanation of the conduct of the fleet; but Count Lamsdorff replied that he was not yet in possession of any official information from Russian sources. To his own colleagues, however, he stated that full reparation would be made, if the Baltic fleet were found to be at fault.

On October 25, the British Foreign Office, in an official communication to the press, announced that it had taken prompt action, as follows: "The Foreign Office have been in communication with representatives of the fishing industry of Hull and Grimsby, and have obtained from them a full statement of the facts connected with the attack by the Russian Baltic fleet upon a part of the Hull trawling fleet. Urgent representations based upon this information have been addressed to the Russian Government at St. Petersburg, and it has been explained that the situation is one which, in the opinion of His Majesty's Government, does not admit of delay." (London *Times*, October 25, 1904.) It was fur-

ther intimated by Lord Lansdowne, Secretary for Foreign Affairs, that immediate explanations and reparation had been asked for, special emphasis having been put upon the failure of the Russians to render any assistance to the victims of the attack.

The same day, the Tsar, though still without news from the fleet, sent, through Count Lamsdorff, a message to King Edward, in which he attributed the incident to "a very regrettable misunderstanding" and expressed his sincere regret to the King and government, adding that "he would take steps to afford complete satisfaction to the sufferers as soon as the circumstances of the case were cleared up."

On October 26, the Russian fleet arrived at Vigo and, for the first time since the Dogger Bank incident, its commander, Admiral Rozhdestvensky, came into touch with his home authorities. On the 27th, it was announced from St. Petersburg that an explanation had been received from the admiral, as follows: "Admiral Rozhdestvensky telegraphs that the Baltic fleet in the course of its voyage met hundreds of fishing boats to which no harm was done, with the exception of the boats in question, among which were noticed two torpedo-boats, one of which disappeared, the other, according to the fishermen, remaining with them till morning. In the circumstances no warships could have acted otherwise. He expresses deep regret for the victims if they were innocent in the matter. The incident began by the two torpedo-boats attacking the leading vessel of the fleet in the darkness, and when the searchlights disclosed the presence of several steam fishing boats, an endeavor was made to spare them, and the Russians stopped firing. The torpedo-boats then disappeared. The fishermen complain that a Russian torpedo-boat remained behind and yet did not attempt to render assistance. This he denies, the fact being that there were no torpedo-boats with the detachment. The detachment did not attempt to offer any help, as they feared a trap, the fishing boats being without lights, although later some lights were shown." (London *Times*, October 28, 1904.)

On the 28th, Mr. Balfour, the British Premier, in the course of a public address, made the following statement on the authorization of the Russian Ambassador at London: "The Russian Government have now ordered the detention at Vigo of that part of



the fleet which was concerned in the incident in order that the naval authorities may ascertain what officers were responsible for it. These officers and any material witnesses will not proceed with the fleet on its voyage to the Far East. An inquiry will be instituted into the facts, and we and the Russian Government are agreed upon an International Commission of the kind provided for by the Hague Convention — I should say that that has nothing to do with arbitration; that is the constitution of an International Commission to find out facts — and any person found guilty by this tribunal will be tried and punished adequately." (*London Times*, October 29, 1904.)

In accordance with the Russian orders, four officers were detained at Vigo, on the departure of the Baltic fleet from that port on November 1. There was some demur on the part of Great Britain at the number and the rank of those left behind, but Russia gave distinct assurance "that the officers detained were those actually implicated in this disaster . . . and that, if it should result from the investigations of the International Commission that other officers were culpable, those officers also will be adequately punished." As further proof of sincere intention, the Russian Government undertook to issue to the fleet "instructions of a kind calculated to prevent the recurrence of such incidents, and to secure neutral commerce from risk or inconvenience."

The formal agreement referring the incident to a Commission of Inquiry was signed at St. Petersburg, November 25, by Count Lamsdorff and Sir Charles Hardinge, the British Ambassador. In the preamble, it was stated that conformably to Articles ix to xiv of the Hague Convention for the Pacific Settlement of International Disputes, the commission was entrusted with "the task of elucidating by means of an impartial and conscientious investigation the questions of fact connected with the incident." Article 1 provided that the commission was to consist of five members, of whom two were to be officers of high rank in the British and Imperial Russian navies respectively. The Governments of France and of the United States were each to designate to the commission one of their nationals — also of high naval rank. These four were to agree upon the fifth member, but, failing agreement, the selection was to be made by the Emperor of Austria. Each party was

likewise to appoint a legal assessor to advise the commissioners, and an agent officially empowered to take part in the labors of the commission.

The scope of the commission was defined in Article II: "The commission shall inquire into and report on all the circumstances relative to the North Sea incident, and particularly on the question as to where responsibility lies, and the degree of blame attaching to the subjects of the two high contracting parties or to the subjects of other countries in the event of their responsibility being established by the inquiry."

Under the remaining six articles, the commission was empowered to settle its own procedure; the parties undertook to afford every facility necessary to insure the success of the commission; Paris was designated as the place of meeting, which was to be held as soon as possible after the signing of the agreement; a report, signed by all the commissioners, was to be presented to the two parties; all decisions were to be taken by a majority of votes; and the expenses of the commission were to be shared equally by the two governments.

As commissioners, the Russian, British, French, and American Governments designated Admirals Kaznakoff, Beaumont, Fournier and Davis respectively. These met for the first time at Paris on December 22 and chose as fifth commissioner Admiral Spaun, of the Austro-Hungarian navy. Thereupon adjournment was made until January 9, 1905, when the sittings were resumed, with Admiral Fournier as president and Admiral Dubassoff as Russian representative in place of Admiral Kaznakoff, who had retired through illness. The early sessions of the commission were occupied in drawing up the rules of procedure which it was to follow. As this was the first instance where an international inquiry under the Hague Convention had been applied, any procedure employed was likely to be regarded as a precedent, and so satisfactory did the rules adopted prove that the Hague Conference of 1907, in formulating that part of its work dealing with International Commissions of Inquiry, embodied in large part the procedure of the commission of 1905.

After the adoption of rules, the commission sat more or less regularly until February 25, when its labors were concluded by the publication of its report.

As presented before the commission, the British contentions were based on the ample testimony of the fishermen of the trawling fleet, who were positive in their denial that there had been either torpedo-boat or destroyer on the fishing grounds on the night of October 21-22. "No warship of any description," it was asserted, "other than those of the Imperial Russian navy were among the trawlers on the night in question and no war-vessels had been seen by any of the trawlers for some time before. There was no war material of any description on board any of the ships of the fishing fleet. There were no Japanese war-vessels of any description in the North Sea at that time, nor were there any Japanese on board any vessels of the fishing fleet." The firing upon the trawlers was in no way justifiable, it had not been controlled to avoid unnecessary damage, and had been continued long after the peaceful character of the fishing vessels had been ascertained. No fault of any kind could be imputed to the British trawlers or their owners. On the contrary, apart from the error of the attack, those on board the Russian fleet had aggravated the seriousness of the incident by failure to render assistance to the injured fishermen.

The Russian case met these contentions by an elaboration in detail of the original explanation given by Admiral Rozhdestvensky. In consequence of reliable intelligence received as to the plans for Japanese attacks in European waters, certain dispositions had been taken to insure the safety of the Russian fleet in its passage through the North Sea. Emphasis was laid on the fact that the Russian torpedo-craft had been sent on ahead in two sections, thus making impossible the presence of a Russian torpedo-boat among the trawlers on the night of the attack. But that other torpedo-boats — presumably Japanese — had been present was supported by evidence that admitted of no doubt. "At 55 minutes past midnight," the Russian case went on to say, "in latitude 55° 18' north and longitude 5° 42' east of Greenwich, the first ship of the last section, the admiral's ship, *Kniaz Svaroff*, perceived ahead the outlines of two small craft approaching at great speed, all their lights out, towards the armor-clads. The whole detachment at once began to work their electric searchlights, and as soon as the two suspicious craft came within the zone of the rays projected they were recognized as torpedo-boats. The armor-clads directly

opened fire on them." Immediately afterwards, the searchlights revealed the fishing boats, some of them lying across the course the fleet was taking. All precautions were taken to prevent injury to the trawlers by reason of their being within the zone of fire, but "nevertheless the very distinct feeling of danger to which the armor-clads were exposed and the imperious duty of protecting them against the attacks of the torpedo-boats necessitated the continuance of the cannonade, notwithstanding the evident risk of hitting not only the fishing boats, but also the ships of the squadron itself." The firing had ceased on the disappearance of the torpedo-boats, and had not lasted more than ten minutes. It was military necessity, based on the uncertainty of attack, and not indifference, that had led the admiral to order the fleet to continue on its course without stopping. For these reasons, according to the conclusion drawn by the Russian case, "Admiral Rozhdestvensky, upon whom rested the heavy responsibility of providing for the security of the forces entrusted to him and of maintaining them in their integrity, had not only the right, but was under the absolute obligation, of acting as he did — that is to say, that while clearly aware of the damage he might cause to inoffensive fishermen, the subjects of a neutral power, he was nevertheless obliged to use all the means in his power to destroy the torpedo-boats which had attacked his squadron."

In its report the commission, after a careful consideration of the facts, "proceeded to give an analytic statement of those facts in their logical order." The various dispositions made on the voyage from Reval to the Dogger Bank were set forth and due value was attached to the mental factor in the situation, induced by the rumor and the uncertainty of impending attack. The dropping behind of a transport, due to a damaged engine, and a message from her commander that he was attacked on all sides by torpedo-boats (when in reality he had met a Swedish vessel and other unknown ships) were considered as "perhaps the incidental cause of the subsequent events," for they had served to confirm previous suspicions and to create a nervous vigilance on the part of the Russian commander. There was nothing unusual in the appearance of the fishing boats, their lights were set, and they were trawling in accordance with customary rules and prearranged signals from

rockets. The other sections of the Russian fleet had passed through the fishing ground without reporting anything suspicious, even under the close scrutiny of the searchlights. It was Admiral Rozhdestvensky's flagship, the *Savaroff*, that first took alarm, the immediate cause being a green rocket fired by the "admiral" of the trawling fleet, "indicating in reality, according to their conventions, that the trawlers were to trawl on the starboard to windward." A vessel thereupon appearing at "an approximate distance of 18 or 20 cables," and suspicion being aroused because they saw no lights, "the men of the watch believed they detected a torpedo-boat going at high speed," and fire was immediately opened upon it. With respect to this phase of the incident, the majority of the commissioners were of opinion "that the responsibility for the act and the results of the cannonade sustained by the fishing fleet rests with Admiral Rozhdestvensky."

As to the justification for the attack, the report was adverse to the Russian contention, as follows: "The majority of the commissioners declare that they lack precise data to identify the objects upon which the ships fired, but the commissioners unanimously recognize that the boats of the flotilla committed no hostile act, and the majority of the commissioners, being of opinion that there was no torpedo-boat either among the trawlers or in the locality, the fire opened by Admiral Rozhdestvensky was not justifiable. The Russian Commissioner, not believing himself warranted in concurring in this opinion, states his conviction that it is precisely the suspicious vessels that approached the Russian squadron for a hostile purpose that provoked the firing." The report then goes on to suggest that perhaps "the real objects of this nocturnal firing" were some warships of the advance sections "delayed on the track of the *Savaroff* without that vessel being aware of it." The commission did not come to any decisive opinion as to the duration of the firing on the port side, because of insufficient information, but on the starboard side, "even from the standpoint of the Russian version, it seemed to have been longer than appeared necessary."

In its concluding statements of fact, the commissioners' report acknowledged that Admiral Rozhdestvensky had done all in his power "to prevent the trawlers, recognized as such, from being the

objects of the fire of the squadron." It recognized, too, that there was sufficient uncertainty, from his point of view, to justify continuation of his voyage, without stopping to assist the trawlers. But "at the same time the majority of the commissioners regret that it did not occur to Admiral Rozhdestvensky, while going through the Straits of Dover, to inform the authorities of the neighboring maritime powers that, having been compelled to open fire in the vicinity of a fleet of trawlers, those boats of unknown nationality were in need of assistance." In conclusion, the commissioners went on record as in no manner reflecting upon either the valor or the humane sentiments of Admiral Rozhdestvensky or of the *personnel* of his squadron.

The report was accepted in good faith by both governments and the incident was closed with the payment by Russia of an indemnity of £65,000.

(*British and Foreign State Papers*, vol. xcvi, pp. 77-79; vol. xcix, pp. 921-26; *Archives Diplomatiques* [1905], vol. xciii, pp. 97-113; vol. xciv, pp. 450-95; *Parliamentary Papers* [1905], (60) *Russia*, Nos. 2 and 3; *London Times*, October, 1904-February, 1905, *passim*.)

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## § 12. PROTESTS AND APOLOGIES

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WHEN one government considers that by the action of another its rights have been seriously violated, it is customary to lodge a formal written protest against the action complained of. This serves as a notice that the injured state intends to employ whatever means seem appropriate and expedient to secure the recognition of its rights under international law. According to the circumstances the discussion may be continued or dropped until such time as the complaining state finds a favorable opportunity for urging its claim. Certain cases are settled by reference to arbitration. Not infrequently governments have tendered full and honorable apologies. Where the governments have not been able or willing to employ some one of the various methods for the peaceful settlement of international differences discussed in

this and the preceding section, there remains only recourse to some means of constraint, unless the weakness or magnanimity of the injured state counsels it to allow the matter to drop.

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### § 13. COERCIVE MEASURES SHORT OF WAR

#### (a) Retorsion

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### LEGISLATIVE RETORSION AGAINST BRITISH VESSELS (1818)

AN act of April 18, 1818, makes the following provision in regard to British vessels:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that from and after the thirtieth of September next, the ports of the United States shall be and remain closed against every vessel owned wholly or in part by a subject or subjects of his Britannic majesty, coming or arriving from any port or place in a colony or territory of his Britannic majesty that is or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States; . . . and every such vessel, so excluded from the ports of the United States, that shall enter, or attempt to enter, the same, in violation of this act, shall, with her tackle, apparel, and furniture, together with her cargo on board such vessel, be forfeited to the United States." (*U. S. Statutes at Large*, vol. III, p. 432.)

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#### (b) Reprisals

(See the *Case of the Forte*, p. 38.)

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#### (c) Threats and the display of force

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### THE CASE OF THE *SUCHET* (1902)

IN the month of June, 1902, while the French Cruiser *Suchet* was temporarily engaged in carrying relief to Martinique (which had

just been overwhelmed by a terrible volcanic eruption), the protection of French interests in Venezuela was entrusted to the German sloop-of-war *Falke*. The *Falke* informed the *Suchet*, on her return to Carupano, that the Venezuelan Government had arrested seven French merchants with the object of forcing them to pay for a second time some customs duties which they had already paid to the revolutionists while the latter were in conflict with the government.

The commander of the *Suchet* demanded that the merchants be released, but this was refused. Thereupon, observing that the Venezuelan gunboat *Restaurador* was about to leave the harbor, the commander of the *Suchet* ordered it to stand by, and sent an officer to her captain to advise the government to liberate the prisoners. All this time the Venezuelan gunboat was commanded by the guns of the *Suchet*. The captain of the *Restaurador* protested to his government against the violence to which he was subjected and asked instructions from President Castro, but received no reply. An hour later the seven Frenchmen were released.

(Translation: *Revue Générale de Droit International Public* [1902], vol. IX, p. 628.)

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(d) Withdrawal of diplomatic representatives

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THE UNITED STATES AND VENEZUELA (1908)

AFTER presenting several notes in which claims against Venezuela were urgently pressed and a reference to arbitration was demanded, Minister Russell in a dispatch of February 29, 1908, made the following report to the Secretary of State:

"AMERICAN LEGATION,

"Willemstad (February 29).

"(Received Mar. 3, 1908 — 1.40 p. m.

"The Venezuelan Government answered to-day my note, sent in accordance with your cable instructions 19th.

"Minister for Foreign Affairs states that Venezuela refrains from



considering for the present the question of arbitration, because I have not as yet refuted the arguments in notes July 9 and September 20, in which notes Venezuela plainly stated grounds for refusing to arbitrate. Note concludes as follows:

“Consequently, as the cases referred to cannot be considered as being comprised among those which call for diplomatic action, the Government of Venezuela would view it with satisfaction if the Government of the United States would consider this question as closed, the parties interested always having the right of recourse to the tribunals of justice of the Republic should they deem fit.”

“RUSSELL.”

Acting under instructions received from Secretary Root, Chargé Sleeper presented to the Venezuelan Minister for Foreign Affairs the following note:

“AMERICAN LEGATION,  
“Caracas, June 20, 1908.

“*Mr. Minister:* Acting under instructions from my government, it devolves upon me to inform your excellency that in view of the persistent refusal of the present Government of Venezuela to give redress for the governmental action by which all American interests in this country have been destroyed or confiscated, or to submit the claims of American citizens for such redress to arbitration, and in view of the tone and character of the communications received from the Venezuelan Government, the Government of the United States is forced to the conclusion that the further presence in Caracas of diplomatic representatives of the United States subserves no useful purpose and has determined to close its legation in this capital and to place its interests, property, and archives in Venezuela in the hands of the representative of Brazil, which country has kindly consented to take charge thereof.

“Pursuant to the aforesaid instructions I shall intrust the archives and property of the legation to the care of Mr. Luis de Lorena Ferreira, and shall proceed to Puerto Cabello and embark on the U.S.S. *Marietta*, which should arrive at the said port at any moment.

“I therefore respectfully apply for my passports, and request

that I be given safe conduct to my port of departure and until embarkation on the *Marietta*.

"I avail, etc.,

JACOB SLEEPER."

To this note the Venezuelan Government made the following reply:

"UNITED STATES OF VENEZUELA,  
"MINISTER OF FOREIGN AFFAIRS,  
"Caracas, June 20, 1908.

"*Sir*: If the grounds which you set forth in your note of this date are those on which President Roosevelt persists in seeking reparation for American interests or individuals, which are wanting in all reason and right; if this persistence arrives at the point of wishing that matters again be submitted to arbitration, which upon the request of the United States Government were already definitely decided by a tribunal of arbiters, wherein said government was duly represented, a pretension which is equivalent to contradicting itself and protesting against its own acts; and if, lastly, the tone and character of our clear and precise arguments have not been pleasing to President Roosevelt, it is not in any way the fault of the Venezuelan Government if, obliged to fulfill its duty, it does not permit that there be taken away and impaired the rights of the nation, free, independent, and sovereign. This attitude can be a motive of congratulation for governments truly friendly with Venezuela, because therein are joined the rights and prerogatives of a whole continent.

"It was upon these very worthy considerations that the Government of Venezuela, in its note of February 29 of the present year, informed the American Minister, in reply to his communication of the 22d of the same month, that his government not having presented any argument which would make its opinion prevail, and the case not being one calling for diplomatic action, the Government of Venezuela would view it with satisfaction if President Roosevelt would desist from his contentions in order that the American claimants should appeal to the tribunals of the Republic with the submission they owe to its laws to defend the rights which they might consider injured, since those laws, to which every foreigner in the country is subjected, are not to be broken, thereby permit-

ting that there be substituted for this legal procedure, *per saltum*, a diplomatic action.

"All this is to be regretted on account of the hereinbefore-mentioned reasons.

"To-day it is the turn of the people of each country to judge of what has happened, in the light of reason and impartial justice, and from what their mutual interests and advantages advise, and later of the sovereign bodies, representatives of those peoples, upon whom it devolves in each country to take cognizance of and decide the case in the last resort.

"As it is your honor's government which has placed an end to your diplomatic functions in this country and as the Government of Venezuela has no cause for complaint respecting you personally, this Government will preserve you in the enjoyment of your diplomatic immunities and prerogatives until your embarkation in Puerto Cabello on the steamer *Marietta*. Not only for the reason above mentioned, that it is not the Government of Venezuela which bids you leave, but also as our actual situation with the United States is not that of war, in which case it would be proper to issue a safe-conduct to the diplomatic agent crossing the territory, my government does not consider it necessary or fitting to send it to you for your journey to Puerto Cabello, passing as you do through civilized and cultured towns which know how to respect those prerogatives and immunities. I take this occasion to remind your honor that important members of the American Legation and tourists come to this country for scientific purposes, and recommended to the aforesaid legation, have traveled over a great part of the territory of the Republic, manifesting their satisfaction to all the authorities along the way for the attentions, facilities, and personal security of which they were the object; and it would be very laudable on your part on your arrival in the United States to so inform your government, so that, as a tribute to truth, the American people may know how foreigners are treated and considered in Venezuela who, by their loyal and correct conduct, make themselves worthy of esteem.

"My government has made a note of the fact that, by orders of your government, the interests, property, and archives of the legation in Caracas have been placed in the hands of the Brazilian Chargé d'Affaires.

"I close by expressing to you, in the name of my government, the most cordial wishes for your pleasant journey, and I avail myself of the opportunity to renew to you the assurances of my distinguished consideration.

"J. DE J. PAUL."

Thereupon Chargé Sleeper placed in the hands of the Brazilian representative the interests, property, and archives of the American Legation and made the following notification to the American Consuls in Venezuela:

"AMERICAN LEGATION,  
"Caracas, June 20, 1908.

"Sir: I have the honor to inform you that the Government of the United States has decided to close its legation in Caracas and to place its interests, property, and archives in Venezuela in the hands of the representative of Brazil.

"Matters of a nature calling for diplomatic intervention should be referred therefore to the Brazilian Minister here, Mr. Luiz de Lorena Ferreira.

"No instructions have been received varying the position or action of consuls.

"Very respectfully,

JACOB SLEEPER."

(Extracted and condensed from *Foreign Relations of the United States*, 1908, pp. 774-830.)

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(e) Collective intervention

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## COLLECTIVE INTERVENTION OF THE POWERS IN CHINA (1900-01)

AFTER the Allies had rescued the legations at Peking, and had once more established order, on December 22, 1900, the diplomatic representatives of the powers at Peking addressed to the Chinese Government the following joint note:

"During the months of May, June, July, and August of the present year, serious disturbances broke out in the northern prov-

inces of China, and crimes unprecedented in human history, crimes against the law of nations, against the laws of humanity and against civilization, were committed under peculiarly odious circumstances. The principal of these crimes were the following:

"1. On the 20th of June, His Excellency Baron von Ketteler, German Minister, proceeding to the Tsung-li Yamen, was murdered while in the exercise of his official duties by soldiers of the regular army acting under orders of their chiefs.

"2. The same day the foreign legations were attacked and besieged. These attacks continued without intermission until the 14th of August, on which date the arrival of foreign troops put an end to them. These attacks were made by regular troops who joined the Boxers and who obeyed orders of the court, emanating from the Imperial Palace. At the same time the Chinese Government officially declared by its representatives abroad that it guaranteed the security of the legations.

"3. The 11th of June, Mr. Sugiyama, chancellor of the legation of Japan, in the discharge of an official mission, was killed by regulars at the gates of the city. At Peking and in several provinces foreigners were murdered, tortured, or attacked by Boxers and regular troops, and only owed their safety to their determined resistance. Their establishments were pillaged and destroyed.

"4. Foreign cemeteries, at Peking especially, were desecrated, the graves opened, the remains scattered abroad.

"These events led the foreign powers to send their troops to China in order to protect the lives of their representatives and their nationals, and to restore order. During their march to Peking the allied forces met with the resistance of the Chinese armies, and had to overcome it by force. China having recognized her responsibility, expressed her regrets, and manifested the desire to see an end put to the situation created by the disturbances referred to, the powers have decided to accede to her request on the irrevocable conditions enumerated below, which they deem indispensable to expiate the crimes committed and to prevent their recurrence:

"I. (A) Dispatch to Berlin of an extraordinary mission, headed by an Imperial Prince, to express the regrets of His Majesty the Emperor of China and of the Chinese Government, for the

murder of His Excellency, the late Baron von Ketteler, German Minister.

"(B) Erection on the place where the murder was committed of a commemorative monument suitable to the rank of the deceased, bearing an inscription in the Latin, German, and Chinese languages, expressing the regrets of the Emperor of China for the murder.

"II. (A) The severest punishment in proportion to their crimes for the persons designated in the Imperial decree of September 25, 1900, and for those whom the representatives of the powers shall subsequently designate.

"(B) Suspension of all official examinations for five years in all the towns where foreigners have been massacred or have been subjected to cruel treatment.

"III. Honorable reparation shall be made by the Chinese Government to the Japanese Government for the murder of Mr. Sugiyama, chancellor of the Japanese Legation.

"IV. An expiatory monument shall be erected by the Imperial Chinese Government in each of the foreign or international cemeteries which have been desecrated, and in which the graves have been destroyed.

"V. Maintenance, under conditions to be settled between the powers, of the prohibition of the importation of arms, as well as of material used exclusively for the manufacturing of arms and ammunition.

"VI. Equitable indemnities for governments, societies, companies, and private individuals, as well as for Chinese who have suffered during the late events in person or in property in consequence of their being in the service of foreigners. China shall adopt financial measures acceptable to the powers for the purpose of guaranteeing the payment of said indemnities and the interest and amortization of the loans.

"VII. Right for each power to maintain a permanent guard for its legation and to put the legation quarter in a defensible condition. Chinese shall not have the right to reside in this quarter.

"VIII. The Taku and other forts which might impede free communication between Peking and the sea shall be razed.

"IX. Right of military occupation of certain points, to be determined by an understanding between the powers, for keeping open communication between the capital and the sea.

"X. (A) The Chinese Government shall cause to be published during two years in all subprefectures an Imperial decree embodying —

"Perpetual prohibition, under pain of death, of membership in any anti-foreign society.

"Enumeration of the punishments which shall have been inflicted on the guilty, together with the suspension of all official examinations in the towns where foreigners have been murdered or have been subjected to cruel treatment.

"(B) An Imperial decree shall be issued and published everywhere in the Empire, declaring that all governors-general, governors, and provincial or local officials shall be responsible for order in their respective jurisdictions, and that whenever fresh anti-foreign disturbances or any other treaty infractions occur, which are not forthwith suppressed and the guilty persons punished, they, the said officials, shall be immediately removed and forever prohibited from holding any office or honors.

"XI. The Chinese Government will [shall] undertake to negotiate the amendments to the treaties of commerce and navigation considered useful by the powers and upon other subjects connected with commercial relations with the object of facilitating them.

"XII. The Chinese Government shall undertake to reform the Office of Foreign Affairs, and to modify the court ceremonial relative to the reception of foreign representatives in the manner which the powers shall indicate.

"Until the Chinese Government have complied with the above to the satisfaction of the powers, the undersigned can hold out no expectation that the occupation of Peking and the province of Chihli by the general forces can be brought to a conclusion.

"PEKING, December 22, 1900.

"For Germany:

A. MUMM.

"For Austria-Hungary:

M. CZIKANN.

"For Belgium:

JOOSTENS.

"For Spain:	B. F. DE COLOGAN.
"For United States of America:	E. H. CONGER.
"For France:	S. PICHON.
"For Great Britain:	ERNEST SATOW.
"For Italy:	SALVAGO RAGGI.
"For Japan:	T. NISSI.
"For Netherlands:	F. M. KNOBEL.
"For Russia:	MICHEL DE GIERS."

The Chinese plenipotentiaries designated to treat with the representatives of the powers replied on January 16, 1901, as follows:

[Translation]

"Under date of December 24, 1900, the plenipotentiaries of Germany, Austria-Hungary, Belgium, Spain, the United States, France, Great Britain, Italy, Japan, the Netherlands, and Russia, have sent us the following note:

[The joint note is here quoted textually and in its entirety.]

"We hastened to transmit the full text of this note to His Majesty the Emperor, who, having taken cognizance of it, rendered the following decree:

"'We have taken cognizance of the whole of the telegram of Yi Kuang [Prince Ching] and Li Hung-chang. It behooves us to accept, in their entirety, the twelve articles which they have submitted to us.'

"Consequently, we, Ching, Prince of the first rank, Plenipotentiary, President of the Council of Foreign Affairs, and Li, Earl of the first rank, Su-yi, Plenipotentiary, Tutor to the Heir Apparent, Grand Secretary of the Wen-hua Tien Throne Hall, Minister of Commerce, Superintendent of trade for the northern ports, Governor-General of Chihli,

"Declare that we accept in their entirety the twelve articles which we have been requested to insure the transmission of to His Majesty the Emperor.

"In witness of which we have signed the present protocol and we transmit to the foreign plenipotentiaries a copy of the edict of His Majesty the Emperor, bearing the imperial seal.



"It is understood that in case of disagreement the French text shall be authoritative.

"PEKING, 16 January, 1901.

"(Signed)

YI KUANG

"(Prince Ching).

LI."

"[L. S.]

After several months of negotiation in regard to the provisions for the carrying out of the terms of the joint note, an agreement was at last reached and included in the peace protocol signed September 7, 1901, by representatives of China and the powers. After the completion of the detailed enumeration of the conditions imposed upon China, the peace protocol concludes as follows:

"The Chinese Government having thus complied to the satisfaction of the powers with the conditions laid down in the above-mentioned note on December 22, 1900 [the joint note], the powers have agreed to accede to the wish of China to terminate the situation created by the disorders of the summer of 1900. In consequence thereof the foreign plenipotentiaries are authorized to declare in the names of their governments that, with the exception of the legation guards mentioned in article VII, the international troops will completely evacuate the city of Peking on the 17th September, 1901, and, with the exception of the localities mentioned in Article IX, will withdraw from the province of Chihli on the 22d of September.

"The present final protocol has been drawn up in twelve identical copies and signed by all the plenipotentiaries of the contracting countries. One copy shall be given to each of the foreign plenipotentiaries, and one copy shall be given to the Chinese plenipotentiaries."

(*Foreign Relations of the United States, 1900*, pp. 244-45; Clements: *The Boxer Rebellion* [New York, 1915], Appendix II, III.)

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## THE RETURN OF THE CHINESE INDEMNITY (1907)

By article 6 of the peace protocol signed September 7, 1901, defining the amount and method of payment of the indemnity re-

quired by the powers of China, China was obligated to pay the powers an indemnity of four hundred and fifty millions of Haikwan taels, which was stated to represent "the total amount of the indemnities for states, companies, or societies, private individuals, and Chinese referred to in article 6 of the note of December 22, 1900."

On June 15, 1907, the Secretary of State addressed the following note to the Chinese Minister at Washington:

*"Sir:* After the rescue of the foreign legations in Peking during the Boxer troubles of 1900, the note of the powers to China prescribing the conditions upon which the occupation of Peking and the Province of Chihli would be ended, dated December 22, 1900, required in its sixth article the payment of 'equitable indemnities for governments, societies, companies, and private individuals, as well as for Chinese who have suffered during the late events in person or in property in consequence of their being in the service of foreigners.'

"The final protocol under which the troops were withdrawn, signed at Peking, September 7, 1901, fixed the amount of this indemnity at 450,000,000 Haikwan taels, equivalent in round numbers to \$333,000,000 United States gold. China agreed to pay this sum, with interest at 4 per cent per annum, by installments running through a period of thirty-nine years.

"The share of this indemnity allotted to the United States was \$24,440,778.81, and on account of the principal and interest of that sum China has paid to the United States, down to and including the 1st day of June, 1907, the sum of \$6,010,931.91.

"It was from the first the intention of this government at the proper time, when all claims should have been presented and all expenses should have been ascertained as fully as possible, to revise the estimate and account against which these payments were to be made, and, as proof of sincere friendship for China, to voluntarily release that country from its legal liability for all payments in excess of the sum which should prove to be necessary for actual indemnity to the United States and its citizens.

"Such a revision has now been made by the different executive departments concerned, and I am authorized by the President to say that, in pursuance of that revision, at the next session of the

Congress he will ask for authority to reform the agreement with China under which the indemnity is fixed by remitting and canceling the obligation of China for the payment of all that part of the stipulated indemnity which is in excess of the sum of \$11,655,-492.69 and interest at the stipulated rate.

"Accept, Mr. Minister, etc.,

ELIHU ROOT."

The Chinese Minister in acknowledgment expressed the grateful thanks of his government "for this signal act of generosity shown by the United States toward China, which cannot fail to bind the two countries into closer and more friendly relations, and which affords another conspicuous proof of the high sense of justice that has always actuated the Government of the United States in its intercourse with China."

On June 27, the Chinese Minister at Washington handed to the President personally a copy of the following telegram received from the Wai-wu Pu: "Your telegraphic report on the remission of the indemnity having been laid before the Emperor, you are commanded to convey to the President of the United States His Majesty's warm thanks for this noble exhibition of his friendship toward China, which is deeply and gratefully appreciated, by having alone taken the lead in a matter of international justice."

(*Foreign Relations of the United States, 1907, pp. 174-76; Clements: The Boxer Rebellion, Appendix III.*)

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(f) Use of force

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## THE BOMBARDMENT OF GREYTOWN (1854)

GREYTOWN, a community then lying outside the acknowledged boundaries of Nicaragua, in what was known as the Mosquito Coast, maintained an independent existence under the authority of the Mosquito King, who was understood to enjoy the patronage of the British Government. As the result of a controversy with Nicaragua concerning limits, which involved the question of jurisdiction over Punta Arenas, property belonging to the Accessory Transit Company, an organization of American citizens holding

a charter from Nicaragua, was on various occasions seized or destroyed at that point by the Greytown authorities, and for these acts damages were demanded. There was, however, another complaint which was supposed to affect the "dignity" of the United States. At that time the United States was represented in Central America by a minister named Solon Borland, from Arkansas, a man of spirit who had served in the Mexican War. One day the Greytown authorities attempted to arrest the captain of an Accessory Transit steamer, then lying at Punta Arenas, when Mr. Borland happened to be aboard. The captain resisted, and, in the scrimmage that ensued, Mr. Borland seized a musket and gave to the captain successful support. Great excitement ensued at Greytown; and it was presently fanned to a flame by the announcement that Mr. Borland intended to call upon the resident United States commercial agent in the evening. A suggestion from the latter that this visit be considerably omitted, Mr. Borland, his blood still up, scornfully rejected; and, while he was in the agent's house, a violent commotion in the street denoted the presence of a mob. Mr. Borland, nothing daunted, promptly appeared in the gallery and warned the tumultuous assemblage to disperse. But his oratory was suddenly checked by a blow in the face from a bottle, thrown by some one in the crowd, who, after draining from the flask the last inspiring drop, used it as a missile. For the redress of these accumulated grievances Captain Hollins, of the U.S.S. *Cyane*, was dispatched to Greytown. Lacking specific instructions as to procedure, he made upon the local community demands which it was either unwilling, or unable, or without adequate opportunity to meet, and, the time limit having expired, first bombarded and then burned the town, utterly destroying it. This somewhat fierce and drastic punitive measure created a sensation throughout the civilized world. I have in my collections a pamphlet on the case, published in France, on the cover of which is an arm uplifted in vengeance and bearing an incendiary torch.

At the time when Greytown was destroyed, numerous foreigners were residing there, including some of British and some of French allegiance. Claims in behalf of the latter were promptly presented to the United States by the French Government on the ground that the destruction of the place was unlawful and unjustified. Marcy,

in his response, maintained that, as the claimants had settled in Greytown, they must be regarded as having committed themselves to its protection, so that, for any injuries they had suffered, they must look for redress to that community, and not to the United States or to any other country with which the local government had happened to fall into difficulty. The argument was marshaled with such crushing force that Lord Palmerston announced in Parliament that Great Britain would not present the claims of her subjects to the United States. The French claims were abandoned. I have reason to believe that Marcy himself considered his note in this case to be on the whole the most finished of all his diplomatic papers.

(Extract from article by J. B. Moore in *Political Science Quarterly*, vol. XXX [1915], pp. 390-92.)

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#### § 14. SELF-HELP

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#### THE CAROLINE AND THE McLEOD CASES (1837-42)

In 1837 there occurred in Canada a rebellion which for a time endangered the good neighborhood of the border. Some of the defeated rebels fled to the United States, where they continued to promote their cause by appealing to American sympathy and enlisting recruits. In spite of measures taken by the officials of the United States to prevent violation of the neutrality laws, an expedition organized at Buffalo crossed the Niagara River and encamped at Navy Island on the Canadian side. Communication with the United States was maintained by the *Caroline*, a small steamer in the employ of the insurrectionists, and their numbers grew until, toward the end of December, 1837, there were reported to be a thousand men. On the 29th of December the *Caroline*, after making several trips to Navy Island, moored for the night at Schlosser, New York. At midnight, a body of armed men, about eighty in number, boarded the steamer, attacked the "passengers" and crew, set her on fire and sent her over Niagara Falls. In the course of the attack, one of the persons on board, an American citizen, was killed.

As soon as he was informed of the incident, Mr. Forsyth, Secretary of State, made diplomatic representation in a note to the British Minister at Washington, who, in a communication of February 6, acknowledged that the force which had destroyed the *Caroline* had acted under the instructions of the British authorities in Canada, but justified its action on the ground that there was no serious attempt to enforce neutrality on the border and that the destruction of the steamer was, in the strictest sense, an act of self-defense. The Government of the United States followed up its protest with a demand for reparation, which Lord Palmerston promised to consider. Nothing further was done, however, for over two years, until the arrest in New York State of one, McLeod, charged with murder as one of the participants in the *Caroline* affair, brought the matter to an issue. Lord Palmerston, admitting the responsibility of the British Government, maintained that the circumstances conformed fully to the conditions as laid down by Mr. Webster in his note to the British Minister, namely, that there had been "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation," and that the act was "limited by that necessity and kept clearly within it."<sup>1</sup> The Government of the United States, on the contrary, while admitting that necessity of self-defense justifies exceptional measures, refused to admit that such necessity had been present in the *Caroline* affair. It was with this difference of opinion still subsisting that the negotiators of the Webster-Ashburton Treaty agreed to drop all further consideration of the case, Lord Ashburton expressing regret that there had been "in the hurried execution of the necessary service a violation of territory," Mr. Webster at the same time giving assurances that the President would make the subject, "as a complaint of violation of territory, the topic of no further discussion between the two governments."

The McLeod case grew out of the *Caroline* affair, as has been stated above, and involved the important question of responsibility for acts of state. Alexander McLeod, a British subject resident in Canada, was arrested in November, 1840, at Lewiston, in

<sup>1</sup> Mr. Webster to Mr. Fox, British Minister at Washington, April 24, 1841. (Webster's *Works*, vol. VI, p. 261.)

the State of New York, charged with the murder of Amos Durfee, who lost his life in the destruction of the *Caroline*. The British Minister at Washington at once avowed the attack upon the *Caroline* as a national act for which no person acting under orders could be held responsible; it was "a transaction of a public character, planned and executed by persons duly empowered by Her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defense of Her Majesty's subjects, and that they were not personally and individually answerable to the laws and tribunals of any foreign country." Hence it was solely a matter between the two governments, and McLeod's release was requested. Mr. Webster, on this presentation of the case, promptly admitted that the adoption of the act as its own by the British Government removed all personal liability; "individuals concerned in it ought not, by the principles of public law and the general usage of civilized states, to be holden personally responsible in the ordinary tribunals of law for their participation in it." But the Government of the United States was unable to secure his immediate release. The New York courts asserted their right to go on with the proceedings and McLeod came up in due time for trial, but was acquitted on proof of an *alibi*.

To prevent a recurrence of this conflict of authority, Congress adopted an act, August 29, 1842, whereby the federal courts are empowered to have jurisdiction over aliens claiming immunity for acts done under authority of their state, "the validity and effect whereof depend upon the law of nations."

It may be added that McLeod afterwards made his arrest and trial the subject of a claim against the United States, which claim came before the commission under the convention of February 8, 1853. It was rejected by the umpire on the ground of *res judicata*, the whole question having been finally settled by Webster and Ashburton in 1842.

(*Messages and Executive Documents* [1838-43], *passim*; Moore: *Digest of International Law*, vol. II, pp. 409-14; Moore: *International Arbitrations*, vol. III, pp. 2419-28; *The Works of Daniel Webster*, vol. V, pp. 116-39; vol. VI, pp. 247-69, 292-303.)

### AMERICAN NAVAL OFFICERS SENT TO AID MISSIONARIES IN TURKEY (1895)

EARLY in 1895 reports were received that American missionaries at Marash, Hadjin, Aintab, and Orfa apprehended a massacre, and that a hostile feeling toward them existed at Erzerum, Van, and Bitlis. On the demand of the legation of the United States at Constantinople, the Porte, while denying the existence of the rumored danger, sent telegraphic orders to the civil and military functionaries in Asia Minor, enjoining upon them the protection of Americans and their property. Besides, the U.S.S. *Marblehead* was ordered from Gibraltar to Beirut, and the U.S.S. *San Francisco*, with Rear-Admiral Kirkland, commander in chief of the European station, from Palermo to Smyrna, Alexandretta, and Adana, under instructions to ascertain, by conference with the United States Consuls and resident American citizens in the places mentioned, what foundation existed for the alarming apprehensions expressed in regard to the massacre of Christians in Turkey, and, in case sufficient ground should be found for such anxiety, to intimate to the responsible authorities of the Government of Turkey that it was the intention of the United States to afford full protection to its citizens who were peaceably residing in that part of the world under the guarantee of treaties. The visit of the ships bore a friendly character. Admiral Kirkland reported that no information could be obtained of any outrages on American citizens, and that his reception was everywhere most courteous.

Mr. Olney, Secretary of State, reported to the President December 19, 1895:

"The number of citizens of the United States resident in the Turkish Empire is not accurately known. According to latest advices, there are 172 American missionaries, dependents of various mission boards in the United States, scattered over Asia Minor. There are also numbers of our citizens engaged in business or practicing professions in different parts of the Empire. Besides these, more or less persons, originally subjects of Turkey and since naturalized in the United States, have returned to the country of their birth and are temporarily residing there. The whole



number of persons comprising these several classes cannot be accurately estimated, but, the families of such citizens being considered, can hardly be less than five or six hundred, and may possibly exceed that total.

"Outside of the capital and a few commercial seaport towns, the bulk of this large American element is found in the interior of Asia Minor and Syria, remote from the few consular establishments maintained by this government in that quarter, inaccessible except by difficult journeys, and isolated from each other by the broken character of the mountain country and the absence of roads. Under these circumstances and in the midst of the alarming agitation which for more than a year past has existed in Asia Minor, it has been no slight task for the representative of the United States to follow the interests of those whose defense necessarily falls to his care, to demand and obtain the measures indispensable to their safety, and to act instantly upon every appeal for help in view of real or apprehended peril. It is, however, gratifying to bear testimony to the energy and promptness of the minister in dealing with every grievance brought to his notice, and his foresight in anticipating complaints and securing timely protection in advance of actual need. The efforts of the minister have had the moral support of the presence of naval vessels of the United States on the Syrian and Adanan coasts from time to time as occasion required, and at the present time the *San Francisco* and *Marblehead* are about to be joined by the *Minneapolis*, which has lately been ordered to the eastern waters of the Mediterranean, the squadron being under the command of Rear-Admiral Selfridge, an officer whose record indicates the necessary discretion in dealing with whatever emergencies may arise."

(Extract from Moore: *Digest of International Law*, vol. vi, pp. 342-43.)

## CHAPTER III

### TREATIES AND OTHER INTERNATIONAL AGREEMENTS

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#### § 15. FORMATION OF TREATIES

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WHEN governments find it possible to reach an agreement for the settlement of some troublesome difficulty or to regulate for the future some matter of sufficient importance, the understanding entered into must be observed with all good faith by each of the parties. Since in the course of time lapses of memory and other influences may, in the case of one or the other of the parties, obscure the nature of his promise, the experience of nations and their widest practice have shown the advantage of celebrating treaties to express the common intention — the meeting of the minds — of the parties concerned. The law of treaties is nothing but a series of provisions recognized as suitable for discovering this common intention or understanding applicable to the conditions which arise.

The method followed in the negotiation of such treaties consists in the appointment of agents of the government, authorized by an instrument called "full powers," to enter into discussions with agents of the other government similarly provided. The "full powers" limit the scope of the proposed treaty. After the plenipotentiaries have submitted their "full powers" one to the other, they are ready to enter upon the discussions, the results of which are drawn up in a series of articles. The separate copies are carefully compared and then transmitted to the governments concerned. If the work of the negotiators has been faithfully performed and if no controlling motive interferes, the appropriate authorities of each government will ratify the acts of its agents, whereby the treaty becomes recognized as a binding obligation

upon the whole state through the action of the government authorized to represent it in international affairs. Due and formal notice of ratification is afforded by a subsequent exchange of ratifications by agents delegated for that purpose at a time and place usually provided for in the treaty itself.

(Cf. Gaillard Hunt: *The Department of State of the United States* [New Haven, 1914], p. 400).

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## § 16. INTERPRETATION AND APPLICATION OF TREATIES

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### VESTED RIGHTS IN THE CANAL ZONE (1913)

THE Joint International Commission on Panama Claims<sup>1</sup> adopted a rule dated August 4, 1913, to the effect that "in all matters affecting the rights of private parties, the treaty between the United States of America and the Republic of Panama is to be referred to as of the date of the exchange of ratifications, to wit, February 26, 1904."

(*American Journal of International Law* [1914], vol. VIII, p. 741.)

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### PERPETUAL LEASES IN JAPAN

*The Permanent Court of Arbitration at The Hague, 1905*

THE early relations of Japan with Western nations were upon the basis of extraterritoriality. In order to accommodate foreign settlement and to facilitate urban development, it was usually stipulated in the various treaties that Japan would grant to resident aliens the right to hold land in certain localities for building purposes on leases in perpetuity. The lots of land thus set aside were specified in the leases, and the only assessment that they had to bear was an annual ground rent paid to the Japanese Government in lieu of all municipal charges. The ultimate ownership of the land, however, was reserved to the state.

As the purpose of the leases was the development of commerce, the lessees erected warehouses and residences upon their hold-

<sup>1</sup> See p. 174 for account of the organization and competence of this commission.

ings; in some cases the terms of the leases called for such buildings under penalty of forfeiture. There was usually no separate title to the buildings, and in the transfers made under consular jurisdiction they were held to pass with the land.

As Japan in the course of time conformed more and more to Western standards, it was felt that the early treaties were out of harmony with modern conditions. Accordingly, she took steps to emancipate herself from the consular régime and to that end negotiated in 1894-96 a new series of treaties with the various European powers and with the United States. These revised treaties were of a uniform type and provided for the complete elimination of extraterritorial jurisdiction by the year 1899. Among other provisions it was stipulated that the foreign settlements were to be incorporated into the general municipal system of Japan and that the funds and common property of the settlements were to be transferred to the competent local authorities. It was further provided — quoting from the treaty with Great Britain of July 16, 1894 — that “when such incorporation takes place, . . . existing leases in perpetuity under which property is now held in the said settlements shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property.”

All the revised treaties had similar clauses, but in a note additional to her treaty, Germany more exactly stipulated that neither the lessee nor his successors should pay any charge upon the leased lands apart from the ground rent, and that the rights acquired under the treaty should continue even after its expiration.

When the new treaties came to be applied, a difference of interpretation immediately developed on the question of leases. The Japanese Government maintained, and by its practice applied, the doctrine that the buildings constructed upon the leased lands were separate from them for purposes of registration and taxation. According to one Japanese commentator, they formed two immovables, independent of each other and hence entirely separate both in fact and in law. “Take for example a house. It is in nature attached to the land. But the ideas of our country up to the present day have regarded it as a thing independent of the

land and not as belonging to the land. Hence the question of attachment to an immovable cannot here arise." The other parties to the treaties, however, protested that a house-tax or other impost upon the buildings was a violation of treaty stipulations, holding them to be "part and parcel of the lands." The foreigners took especial exception to certain ordinances of the Japanese Government calling for the registration of the perpetual leases, termed in the ordinances "superficies," and instituting, in the case of transfers, a tax of  $2\frac{1}{2}$  per cent on the value of the buildings transferred. These regulations, it was asserted, were in violation of prescriptive rights and had the effect of depreciating the value of the leaseholds, while the house-tax itself, though not excessive in the first instance, was within the discretion of local assemblies in which the foreigner had no voice, and might be levied as often as deemed necessary or convenient.

Much diplomatic protest followed in the course of the years 1899 to 1902. The Japanese Government was firm in its contention that its enactments "do not have the effect of exempting the buildings from the taxes and registration fees which are leviable in respect to other buildings; neither do they relieve foreigners from the obligation to pay income taxes in respect of incomes derived from property held under such leases;" and it expressed inability "to bring themselves to the conclusion that the provisions of the treaties now in force exempting property held under perpetual leases from taxation have the extended meaning which has been claimed for them." But to settle the dispute, the Japanese Government finally made an offer to the protesting powers to arbitrate the validity of the house-tax (but not the income tax), and Great Britain, France, and Germany made acceptance. The United States did not become a party to the arbitration, but, by an exchange of notes with Japan, it was agreed that the two governments would abide by the decision rendered and that Japan would "apply the principle to citizens of the United States equally with the subjects and citizens of Germany, France, and Great Britain."

In fulfillment of the agreement, a protocol was concluded on August 28, 1902, between the three European powers on the one side, and Japan on the other. The question at issue was formu-

lated as follows: "Whether or not the provisions of the treaties and other engagements . . . exempt only land held under leases in perpetuity granted by or on behalf of the Japanese Government, or land and buildings of whatever description, constructed or which may hereafter be constructed on such land, from any imposts, taxes, charges, contributions, or conditions whatsoever, other than those expressly stipulated in the leases in question?"

The tribunal was to consist of three arbitrators, members of the Permanent Court of Arbitration. Failing selection of the umpire by the other members of the tribunal, the choice was vested in the King of Sweden and Norway. Definite provisions were made for the submission of cases, counter-cases, evidence, arguments, and final replies, and for the general conduct of the arbitration the Hague Convention of 1899 was to govern.

The tribunal met at The Hague on November 21, 1904, and was composed of M. Renault, designated by the European powers, M. Motono, the Japanese Ambassador at Paris, and the umpire, M. Gram, of Norway, chosen by the other two. Four sessions were held and the award was rendered May 22, 1905.

In justification of the house-tax, Japan relied upon a strict interpretation of the treaties and the leases. It was incumbent upon the foreigner to establish the exemption and it was not sufficient to allege a like immunity under the old régime. Conditions were not similar in the two cases. Under extraterritorial jurisdiction it was notorious that the foreigner was exempt from all taxation, but this privilege was withdrawn under the revised treaties which established "a positive régime of equality between strangers and nationals in the matter of imposts." One element in the interpretation of the leases was the application of Japanese law, for since the leases were concerned only with the thing leased — land — and since this land was situated in Japan, the territorial law applied as a condition precedent to any judicial lien. Japan had not repealed Japanese law for another system. Even under the old treaties, it had not been superseded, but rather adapted so as to square with the exceptional measures of extraterritoriality. Japanese law reserved to the state the property in land, but made a distinction between land and buildings, both for civil and fiscal purposes. This distinction was very old, deriving from ancient

custom, which never considered buildings as forming part of the land, or as accessories. In actual Japanese legislation land and buildings could, separately, be burdened with real rights, and an act of disposition of the one had no necessary effect upon the other. Financial legislation and scientific economy everywhere recognized two elements in national wealth — the soil, the source of natural production, and wealth created by artificial effort. It was inequitable to transfer to the one the exemptions accorded to the other. This distinction between the ownership of the soil and of the buildings was not peculiar to Oriental law; it was found in many legal systems, among them the French code, which even recognized separate ownership in the various stories of a building. The property in the land belonged to the Japanese Government, but the property in the buildings belonged to holders of the leases. This was seen in the case of cancellation of leases; the land reverted to the government as original owner, but the buildings were not said to *revert* but to *become* the property of the Japanese Government, implying that, without this forfeiture clause, title to the buildings would not vest in the government. Further, while leased lands, to be transferred, required the assent of consul and governor, buildings on leased lands were constantly bought and sold without any such formalities, indicating that they were held independently of the leases. In some localities twenty per cent of the owners of buildings were other than leaseholders. The fact that the leases were given for the purpose of building could work no prejudice to the sovereign right of Japan to tax property outside the actual grant. The mere statement of the purpose did not enlarge the scope of the grant, and a reference to old treaties — for example, that with Great Britain in 1858 — indicated a clear distinction on this point: British subjects were to have the right to lease ground and to purchase the buildings thereon and might erect dwellings and warehouses.

The protesting powers met these contentions by a denial that Japanese law should apply to the case. The treaties and the leases went outside of municipal law and themselves constituted the only law applicable. Interpretation should be on the basis of natural law, reason, and logic. There was no intention to go beyond the assumptions of the contract, but rather to find out

what the assumptions were. Everything incorporated inseparably in the soil in a permanent and durable manner constituted a single whole with it. It could be otherwise only by express stipulation. Nothing could derogate from this principle of accession but a right of "superficies" admitted by the lessee. That the distinction contended for by Japan was not contemplated is proven by the purpose of the parties, which was to build, by the special arrangement agreed to by the lessor, by express mention of an immovable whole (soil and buildings) as reverting to the lessor or as passing in transfer, and by constant usage in dispositions, alienations, etc. The rent payable for the leases was out of all proportion to the value of the improvements to be made. It — the rent — was a ground rent, conventional and in the lump, and was the counterpart of various municipal obligations assumed by the Japanese Government. It was further maintained that the intention of the negotiators, in revising the treaties, was clearly to treat the buildings as part of the leased lands. The Japanese text indicates this by using for "property" a word signifying "land and things fixed thereto." The various governments interested had attached the same meaning to the expression, but now the Japanese Government was contending for a narrow and technical interpretation of the word, forgetful that the property dealt with was not the mere land granted in the original leases, but the property "now held in the settlements" at the time of the incorporation provided for by the treaties. Under extraterritorial law houses were not recorded separately from the land and this was the law in force at the time the treaties were made. As for the equity in the case, the protesting powers pointed out that only the execution of a contract was at issue and that they would not have consented to forego the rights acquired by former treaties except for compensation. But, if a privileged position resulted, it would be largely justified by the contribution that the first foreign residents had made to the commercial, economic, and financial prosperity of Japan. If there was inequality, it was all in favor of the Japanese, who enjoyed in European countries freedom to acquire outright property in immovables, though this privilege was denied foreigners in Japan.

The tribunal, while admitting that some argument might be



adduced that soil and buildings constituted, from the fiscal point of view, entirely distinct objects, was inclined to attach most importance to the actual practice under the leases and to the intention of the negotiators of the treaties. For that reason it did not stop to discuss the principles invoked from the civil law. It was not to be disputed that both land and buildings had been exempt from all imposts not specified in the leases. The claim of Japan that this was because the consular tribunals had not given the necessary sanction to the Japanese fiscal laws was void of proof, and, besides, Japan had never made reservations looking toward the maintenance of the right thus impaired. When negotiating the revised treaty with Great Britain, Japan had sought to place foreigners on the same footing as Japanese subjects in the matter of taxation, but the agreement made was to maintain the *status quo*. The contention that the *status quo* did not contemplate the land was not borne out by the language of the negotiators. It was not to be assumed that Great Britain intended to make a restriction with reference to the buildings, and similarly in the case of the other powers: the treaties did not refer to the lands as they would have done if the immunity was to be confined to them alone, contrary to the previous practice, but used expressions that comprehended the whole subject-matter of the leases. Hence the award:

"The provisions of the treaties and other engagements mentioned in the protocols of arbitration exempt not only the lands held in virtue of the perpetual leases granted by the Japanese Government in its name, but they exempt the lands and buildings of all kinds constructed or which may be constructed upon these lands, from all imposts, taxes, charges, contributions, or any conditions other than those expressly stipulated in the leases in question."

(*Archives Diplomatiques* [1905], vol. xciv, pp. 666-740; *British and Foreign State Papers*, vol. xcv, pp. 86-90; vol. xcvi, pp. 140-46; *Foreign Relations of the United States*, 1901, pp. 313-66; 1902, pp. 687-730; G. G. Wilson, *The Hague Arbitration Cases*.)

## § 17. TERMINATION OF TREATIES

## THE NEUTRALIZATION OF THE BLACK SEA

(1856, 1870-71)

IN 1856, the powers of Europe assembled in congress at Paris to settle various questions arising out of the relations between Turkey and Russia after the Crimean War. The results of their deliberations were the Treaty of Paris of March 30, 1856, signed by Austria, Great Britain, France, Prussia, Russia, Sardinia, and Turkey; a convention of the same date between the same parties; and a convention, also of the same date, between Russia and Turkey. The substance of these agreements was that the Black Sea should be neutralized; that it should be closed to vessels of war of all states, Russia and Turkey included; that no military or naval establishment should be maintained on its coasts; and that, to guarantee to Russia immunity from foreign attack, Turkey should prohibit the passage of all warships through the Dardanelles and the Bosphorus as long as the Porte remained at peace. Exception was made only in the case of light vessels in the coastal service or on diplomatic missions.

In 1870, while two of the signatory powers were engaged in war, Russia announced her intention to regard herself as no longer bound by the special convention of the Treaty of 1856 respecting the neutrality of the Black Sea. In a note of October 19/31 addressed to the other parties to the treaty, Prince Gortchakoff explained that Russia considered the principle (the neutralization of the Black Sea) "to be no more than a theory," inasmuch as Turkey maintained unlimited naval forces in the archipelago and the straits, while Great Britain and France could concentrate their squadrons in the Mediterranean. But what was especially significant in the note was the reference to the validity of the treaty, as follows: "The treaty of March 18/30, 1856, has, moreover, not escaped the modifications to which most European transactions have been exposed, and in the face of which it would be difficult to maintain that the written law, if founded upon the respect for treaties as the basis of public right and regulating the relations

between states, retains the moral validity which it may have possessed at other times." (*Parliamentary Papers* [1871], vol. 36, p. 11.)

The modifications referred to were stated to be (1) the union of Moldavia and Wallachia "by a series of revolutions which are equally at variance with the letter and the spirit of these transactions;" (2) the admission to the Black Sea of "whole squadrons" of foreign warships; and (3) the employment of ironclads in modern navies, increasing thereby the danger for Russia in the event of war "by adding considerably to the already patent inequality of the respective naval forces."

For these reasons, the Russian representatives were to bring to the knowledge of the governments to which they were accredited the following conclusions: "Our Illustrious Master cannot admit *de jure* that treaties, violated in several of their essential and general clauses, should remain binding in other clauses directly affecting the interests of his Empire. His Imperial Majesty cannot admit *de facto* that the security of Russia should depend on a fiction which has not stood the test of time, and should be imperiled by her respect for engagements which have not been observed in their integrity. . . . His Imperial Majesty cannot any longer hold himself bound by the stipulations of the Treaty of March 18/30, 1856, as far as they restrict his sovereign rights in the Black Sea." (*Parliamentary Papers* [1871], vol. 36, p. 12.)

In his reply to the Russian note, Lord Granville, the British Foreign Secretary, set aside consideration of the merits of the Russian statements of fact and confined himself to the question, "In whose hands lies the power of releasing one or more of the parties from all or any of these stipulations?" His criticism of the note was, in part, as follows:

"The dispatches of Prince Gortchakoff appear to assume that any one of the powers who have signed the engagement may allege that occurrences have taken place which, in its opinion, are at variance with the provisions of the treaty, and, although this view is not shared nor admitted by the co-signatory powers, may found upon that allegation, not a request to those governments for the consideration of the case, but an announcement to them that it has emancipated itself, or holds itself emancipated, from any

stipulations of the treaty which it thinks fit to disapprove. Yet it is quite evident that the effect of such doctrine, and of any proceeding which, with or without avowal, is founded upon it, is to bring the entire authority and efficacy of treaties under the discretionary control of each one of the powers who may have signed them; the result of which would be the entire destruction of treaties in their essence. For whereas their whole object is to bind powers to one another, and for this purpose each one of the parties surrenders a portion of its free agency, by the doctrine and proceeding now in question, one of the parties in its separate and individual capacity brings back the entire subject into its own control, and remains bound only to itself." (*Parliamentary Papers* [1871], vol. 36, p. 15.)

Prince Gortchakoff, however, found himself unable to admit "that the abrogation of a theoretical principle without immediate application, which only restores to Russia a right of which no great power can be deprived, can be regarded as a menace to peace, or that in annulling a point of the Treaty of 1856 the annulment of the whole can be implied." (*Parliamentary Papers* [1871], vol. 36, p. 34.)

The other signatory powers took the same view of the treaty as Great Britain. On the suggestion of Bismarck, a conference of these powers was held at London in January, 1871, for the purpose of removing the diplomatic difficulty that had arisen.<sup>1</sup> In an annex to the protocol of the first day's proceedings, the following declaration was made with respect to the validity of treaties: "The plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Italy, of Russia, and of Turkey, assembled to-day in conference, recognize that it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement." (*Parliamentary Papers* [1871], vol. 36, p. 127.)

But, having enunciated the general principle, the powers proceeded to grant to Russia what she had contended for under her

<sup>1</sup> France was not represented in the conference until the session of March 13, because of difficulty in securing a safe-conduct for the passage of her plenipotentiary through the Prussian lines. She, however, signed the Treaty of London.

interpretation of the treaty. A new agreement<sup>1</sup> was entered into whereby articles 11, 13, and 14 of the Treaty of Paris were abrogated, together with the separate convention between Russia and Turkey annexed to article 14, the whole being replaced by the following: "The principle of the closing of the Straits of the Dardanelles and the Bosphorus such as it has been established by the separate convention of March 30, 1856, is maintained, with power to His Imperial Majesty the Sultan to open the said Straits in time of peace to the vessels of war of friendly and allied powers in case the Sublime Porte should judge it necessary in order to secure the execution of the stipulations of the Treaty of Paris of March 30, 1856. The Black Sea remains open, as heretofore to the mercantile marine of all nations." (*Parliamentary Papers* [1871], vol. 36, p. 170.)

(*British and Foreign State Papers*, vol. XLVI, pp. 8-23; vol. LXI, pp. 7-11; 1193-1227. *Parliamentary Accounts and Papers* [1871], vol. 36, pp. 1-176.)

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### THE WOHLGEMUTH AFFAIR (1889)

TOWARD the end of February, 1889, a Bavarian tailor, Lutz by name, residing in Basle, received from Wohlgemuth, a German police inspector of Mülhausen, a letter signed with a fictitious name proposing that he enter the service of the German police. Later an interview was arranged for at Rheinfelden in Switzerland, and Wohlgemuth sent Lutz a postal money order of ten francs to pay his transportation. At this interview arrangements were discussed and agreed upon and Wohlgemuth handed Lutz eighty marks. Lutz commenced to make his reports and received remittances of several hundred marks. Wohlgemuth expressed himself as pleased with Lutz's activities and in one of his letters wrote to him, "*Wühlen Sie nur lustig drauf los.*"<sup>2</sup>

<sup>1</sup> Treaty of London, March 13, 1871.

<sup>2</sup> *Wühlen* describes the action of a mole; to burrow secretly and undermine; also to ferret out, as we should say. As describing political activity it would mean to stir up discontent, to work up an agitation without actually being directly concerned in any overt act. *Die Wühler und Hetzer* is stronger and means social agitators in a bad sense of actual disturbers of public order. *Wühlen*, used in the sentence,

About the middle of April, Lutz, it appears, proposed a new meeting at Rheinfelden to make important communications to Wohlgemuth. He claims in this matter to have acted only upon the advice of his Socialist friends, who wanted him to expose Wohlgemuth whose activities in Switzerland had been known for some time. On the following Sunday, April 21, 1889, when Wohlgemuth crossed the frontier and arrived in Rheinfelden to keep the appointment as agreed upon, the local police, to whom Lutz's associates had shown some of the letters received from Wohlgemuth, arrested both Lutz and Wohlgemuth. They were searched and questioned, and papers considered of a compromising nature were found on Wohlgemuth. In vain he pleaded his official position as a German police inspector. He was imprisoned and Lutz was momentarily released. Wohlgemuth admitted that he had written the letters in question, but insisted that his action had been confined to a perfectly legitimate investigation of the socialistic activities on Swiss territory. In his examination he affirmed that he had expressly warned Lutz at their first interview against inciting to unlawful agitation, and that it had been understood that Lutz was to do no more than keep him informed of what was going on.

The German Government maintained that it was necessary in the interests of its national security to employ secret agents to secure information of the socialistic activities on Swiss territory. Prince Bismarck demanded the release of Wohlgemuth, but the Swiss Federal Council proceeded to conduct an investigation, as a result of which they decided to take action in conformity with article 70 of the Swiss Constitution, which authorizes the Confederation to expel from its territory "aliens who constituted a danger to Switzerland's internal security or its foreign relations." Wohlgemuth was accordingly expelled, and after a supplementary investigation a similar course was taken in regard to the Bavarian tailor, Lutz. The decree of expulsion against Wohlgemuth gave as the reasons for this action that he had committed on Swiss

"*Wählen Sie nur lustig drauf los,*" may reasonably be said to imply an exhortation to Lutz to incite his associates to disturb the peace. In France Wohlgemuth was characterized as an *agent-provocateur*. Clunet translates the sentence into French, "*Faites de l'agitation souterraine et allez-y gaiement!*" (*Journal de Droit International Privé* [1889], vol. xvi, p. 418.)

territory acts which would have the result of endangering the internal security or the foreign relations of Switzerland, and that he had approached Lutz, a Bavarian residing at Basle, with the avowed intention of stirring up agitation among the workmen of Basle, Alsace-Lorraine, and the Duchy of Baden; and that he wrote him among other things, "*Wühlen Sie nur lustig drauf los*" [Continue to stir up agitation and work at it right merrily]. In execution of this decree Wohlgemuth was expelled after an imprisonment of ten days. (Clunet: *Journal de Droit International Privé* [1889], vol. XVI, pp. 418-23.)

The German Government took exception to the treatment of Wohlgemuth and requested the Swiss Federal Council to annul the decree of expulsion. The semi-official *North-German Gazette* (June 5) intimated that the German Government would have to retaliate by enforcing a most rigid and inconvenient inspection of travelers and imports crossing the border. (Schulthess: *Europäischer Geschichtskalender* [1889], vol. XXX, p. 96.)

The Swiss Government answered the German Government that any "attempt" to apply measures which were directed against Switzerland "would in advance be considered as without justification." (*Archives Diplomatiques* [1889], 2d series, vol. XXXI, p. 334.)

At this juncture Russia and Germany, and later Austria, drew the attention of the Swiss Government to the dangers which threatened them because of the great tolerance accorded anarchists and revolutionists on Swiss territory, and as friendly powers, guarantors of Switzerland's neutrality [neutralization], warned her, if she did not repress those activities of a nature to disturb their internal security, that they would have to consider whether the continuation of Switzerland's neutrality [neutralization] would be to their advantage.<sup>1</sup> (*Archives Diplomatiques* [1889], 2d series, vol. XXXI, p. 334.)

The two governments entered into an exchange of notes. The

<sup>1</sup> June 17, the *North-German Gazette* announced: "On the 13th of this month the German and Russian representatives delivered to the Swiss Minister for Foreign Affairs an official written notice in which they complained that the Swiss authorities had abused the rights of neutrality [neutralization] accorded to Switzerland and had not fulfilled the corresponding obligations." (Schulthess: *Europäischer Geschichtskalender* [1889], vol. XXX, p. 97.)

third of those communicated by the German Government sets forth its views as follows:

*"VAREIN, June 26, 1889.*

"Your report of the 18th of this month, No. 69, received, together with the two notes of the 15th and 17th which M. Droz addressed to you. They state that the Federal Council has expressed its regret that the Imperial Government refuses to submit the Wohlgemuth affair to a fresh examination.

"We arrived at this decision because we were convinced that no new examination could in any way alter the fact that an officer of the imperial police was, with the knowledge and aid of Swiss officials, enticed to Swiss territory so that he might be imprisoned there, and that the Central Government adopted this action of the cantonal authorities as its own by inflicting upon the German officer the penalty of expulsion. No further inquiry could controvert this fact.

"By the expulsion in question, the Central Swiss Government has evinced a determination not to accord to German officials, whose duty it is to obtain information in Switzerland about the plottings of our German adversaries, the same indulgence and toleration granted so freely in Switzerland to Germans who are enemies of the Empire.

"Since in consequence we can no longer protect ourselves by surveillance on the spot against the revolutionary plottings and writings of German enemies of the Empire who are tolerated in Switzerland, we shall be obliged, as I explained in my dispatch of June 6 to Your Excellency, to withdraw to the German side of the frontier the supervision we exercise over these hostile plottings, though it must needs be said that supervision thus exercised can be effective only in a limited degree, to the great prejudice of the peaceful part of the population of the two countries. The precautions to be taken to this end will have an undoubted bearing upon the stipulations of the treaty of settlement, in regard to article 2 of which the Swiss Government holds an opinion at variance with ours.

"The text of the treaty does not permit in our judgment of any such divergence of opinion; it states that Germans settling in Switzerland must be provided with certain authorizing papers



issued at the place whence they came. If the Swiss interpretation were correct, if each of the two governments and especially Germany had wished merely to recognize the other's right to require or not to require the papers in question, the text would have been drafted in this sense, namely, that each of the two governments may require the papers, that each reserves to itself the right to require them or not to require them. If in this article the word "must" (*müssen*) was employed, it is proof that we, at least, from the year 1876 have attached some importance to being assured that no German subject hostile to the authorities of his country can claim protection in Switzerland by virtue of this treaty.

"M. Droz's note considers this interpretation of ours inadmissible, on the ground that it is irreconcilable with the sovereign rights of the contracting parties. To this I might simply reply that every treaty between nations, in so far as it has to do with duties and rights, necessarily involves for each of the contracting parties some limitation upon its absolute freedom in the exercise of its sovereign rights.

"In Germany we do not look upon article 2 of the Treaty of April 27, 1876, as placing too great a limitation upon the sovereign rights of the country. The proof of this lies in the fact that in the German Empire this article 2 has been applied for more than ten years in the way in which I have just explained it, and that we grant the right of settling in Germany only to those Swiss who present the certificates of the country whence they come, as provided for in article 2. If this procedure is reconcilable with the sovereignty of the German Empire, the argument that Swiss sovereignty may not admit of such a concession is hardly of a nature to convince us, especially since, as M. Droz observes, it is not a question of admitting foreigners in general, but relates only to the conditions of admission of German subjects into Switzerland. There they retain their status of German subjects, and very naturally states concluding treaties stipulate therein the conditions to be applied to the treatment of their own subjects in foreign countries.

"Germans who settle in Switzerland are none the less German subjects, and between two states in friendly relations, such as

existed between Switzerland and the German Empire in the year 1876, it was natural and conformable to custom for assurances to be exchanged with respect to the treatment to be accorded by each to the subjects of the other, inclusive of surveillance.

"Treaties like the treaty of settlement of 1876 can be carried out only where there exists that mutual good-will of which the treaty is the expression, and only for so long as this good-will continues between the contracting parties.

"To our regret the good-will which we feel for our Swiss neighbor is not reciprocated, and the treaty seems no longer in accord with the relation which has sprung up with this change of feeling.

"The Swiss Government has up to the present time simply failed to fulfill the stipulations of article 2, and it is just here that one of the chief reasons must be sought for the regrettable change which has come about in our mutual relations. If these stipulations had been fulfilled, it is not to be supposed that the German Government would have felt it necessary to place under police surveillance the secret activities of its subjects settled in Switzerland.

"The note of the 15th for the first time makes an official statement in regard to the non-execution of article 2.

"We should then be within our rights in declaring the Treaty of 1876 from this moment void because of the official refusal on the part of Switzerland to put it into execution. But in consideration of the consequences involved in this sudden change for the subjects of both countries, we shall proceed instead to make use of our right to terminate the treaty in accordance with article 11, and shall send you the necessary powers.

"From the indications found in the note of June 17, that the Swiss Government is preparing to modify its system for the protection of international relations and interests (*police internationale*), I derive the hope that as a result of these efforts we may be relieved in future of the necessity of having recourse on our own account and within our frontier to measures of a nature to afford the requisite protection against the criminal activities of the German Socialist Democrats established in Switzerland.

"It would give us satisfaction if the means should be found in Switzerland to restore our confidence that our internal security

would not be more dangerously menaced from that quarter than from the other frontiers of the Empire. Had article 2 of the treaty been observed in Switzerland with the same exactness as in Germany, our confidence would not have been shaken and we should not have had reason to believe that the attitude of the Swiss toward their German neighbors was not to-day such as would be expected from those who had entered into a treaty of so intimate a nature as that of 1876.

"M. Droz ends his note by asking us not to consider the Government and the Swiss people as the promoters of revolution and anarchy. I do not recall that we have made such a complaint to the Department of Foreign Affairs of the Confederation. Nor do I entertain any doubt that the Central Government of the Confederation intends to live up to the obligations toward neighboring nations in the manner indicated at the end of the note just referred to, but I have to admit that the legislation which has been in force up to the present in Switzerland does not give the Central Administration the means to compel the local authorities of certain of the cantons to observe the respect which is due to foreign powers and necessary for the maintenance of friendly relations between neighboring states."

In response, M. Droz, acting under the direction of the Federal Council, addressed, on July 13, the following note to M. von Bülow:

"The undersigned has been directed to reply as follows to the dispatch of His Excellency Prince Bismarck, dated July 26, of which His Excellency M. von Bülow delivered him a copy July 1.

"In his note of June 15 the undersigned stated that he should not for his part again refer to the Wohlgemuth incident. That he does so now is simply to repeat in reply to the dispatch:

"First, that the Swiss authorities have in no manner whatsoever laid or helped to lay a trap for the police inspector of Mülhausen;

"Second, that that official was imprisoned and then expelled, not because he came to Switzerland for the purpose of gathering information, but because he was trying to foment a disturbance;

"Third, that a friendly discussion and the exchange of opinions would, we consider, have brought these facts out clearly.

"The Federal Council cannot admit the justice of the deduc-

tions that His Excellency Prince Bismarck draws from this incident. On the contrary, the Federal Council considers that in acting to make clear its firm intention to put an end in Swiss territory to disorders, whether factitious or real, it is really acting in the interests of the two countries properly understood.

"In his dispatch the Chancellor maintains his view in regard to the meaning of article 2 of the treaty of settlement.

"The Federal Council regrets profoundly to note the appearance of an interpretation of the treaty which has not, until the recent communication of the German Government, ever been the subject of discussion between the two countries. Even if we consider that the literal meaning of article 2 is capable of a twofold interpretation, the German Government, if it would have its own accepted, should show that it corresponds substantially to the will of the contracting parties at the moment when the treaty was concluded. But as to this [will of the parties], there can be no room for doubt; the message of the Federal Council to the assembly relative to our treaty of settlement with Germany (June 3, 1876); the report of the Council of the States (June 20, 1876); and finally the memorandum upon the same matter, of the German Chancellor to the Reichstag (November 18, 1876) prove clearly and concordantly that the two governments did not intend to restrict their right to receive within their territory whom they chose, but that their only purpose was to fix the conditions, upon compliance with which sojourn or settlement within the territory of either state might not be refused to citizens of the other.

"To cite but a single document, this is what the Chancellor's memorandum says relative to article 2 of the treaty of settlement:

[Translated from the German text.] "'Article 2 defines the papers which German citizens may be required to produce upon demand [*auf Erfordern*] in order to be allowed to reside in Switzerland or to settle there. In this respect no more will be required of Germans, than of citizens of the Swiss Cantons.'

"The words 'upon demand' [*auf Erfordern*], to make sense, can evidently refer only to the Swiss authorities. They show clearly

that in the opinion of the author of this message to the Reichstag citizens of the German Empire must, in order to reside in Switzerland, be ready to exhibit the papers prescribed when they are called for, but that the Swiss authorities are not obliged to require them.

"This is also apparent from the history of the negotiations of our treaty of settlement with Germany, which was based upon similar treaties concluded by Switzerland with the Grand Duchy of Baden October 31, 1863, with France June 30, 1864, with Würtemberg March 18, 1869. Article 4 of the treaty with Würtemberg says that, to obtain permission to settle in either state, *it suffices* to deposit the certificate of nationality [*acte d'origine*] and a certificate testifying that the individual is of good character and not a pauper.

"There is no mention of any obligation for either government to *require* these certificates. The *Swiss negotiators* [*délégués*] proposed the very exacting conditions contained in the treaty of April 27, 1876, so as to make it clear that Germans could not escape the requirements of the Swiss law relative to supervision over aliens and so as to conform to the terms of article 2 of our treaty of June 30, 1864, with France. This article 2 of the treaty of June 30, 1864, with France reads as follows:

"'To acquire a domicile or to settle in Switzerland *Frenchmen must be provided with* a certificate of registration giving their nationality, which will be issued to them by the French Embassy after they have exhibited certificates of good character and the other papers required.'

"The essential provisions of the two treaties are thus seen to be identical, yet France, like the German Chancellor in 1876, never understood the stipulations of this article as constituting an obligation imposed upon Switzerland to restrict the permission of residence to those Frenchmen exclusively who should have complied with the conditions therein enumerated, but considered it as giving Switzerland the right so to act. The same is true of the other countries with whom we have similar treaties.

"In view of the above considerations we cannot refrain from expressing our surprise to hear it affirmed that even in 1876 the

German Government considered it important to prevent Switzerland, by the stipulations of the treaty of settlement, from receiving all German subjects who did not get on with the German Government. If this desire [on Germany's part] existed, it remained a secret. The German negotiator did not express it and article 2 of the treaty does not give expression to it. Such an intention would furthermore have been contrary to the spirit of the treaty, the object of which was not to hinder but to facilitate the reciprocal settlement of citizens of each of the states within the territories of the other, by assuring them the enjoyment of the maximum of rights and advantages possible (articles 3 and 6).

"We must repel the imputation that we have not observed the terms of the treaty of April 27, 1876, and absolutely contest the right of the German Government to declare the treaty at an end because of our failure to observe it. In regard to the manner in which the treaty has been carried out by the parties we shall only draw attention to the following considerations:

"In the first place, precise information permits us to affirm that a certificate of good character has not been required in every instance of Swiss citizens settled in Germany.

"Further, it is to be noted that the Federal Council has made known sufficiently its method of applying article 2 through various official publications, among others the circular of September 13, 1880, which gave rise to a diplomatic correspondence with the German Legation at Berne, and again through the supplementary circular of February 16, 1881, and repeatedly through the Council's annual report [*rapport annuel de gestion*]. Since these documents were transmitted to the German Legation as soon as they appeared, without ever giving rise to any objection to their contents, it is impossible to conceive how the German Government now asserts that it has only learned what is our interpretation of the treaty from our note of June 15.

"Finally, we ought to make it a subject of remark that our police of the cantons have cause to be exacting in regard to the certificates carried by aliens in order to prevent an invasion of suspected persons who so easily become a danger and a burden to our country. This was the consideration which occupied us when the terms of the treaty of April 26, 1876, were drafted.

Without placing too great store by the certificates of good character, which are often delivered in such a way as to deprive them of any serious credence, — for the worst class of anarchists and revolutionists with their papers perfectly in order are sometimes unsuspectingly admitted, — we are, nevertheless, far from wishing to renounce this guarantee intended for our protection. Indeed we are glad to note that the authorities of the cantons may in future require a still more rigorous application [*production*] of this guarantee without the risk of having the German Government itself make a request for leniency in the execution of this clause of the treaty.

“The undersigned hopes that this statement of the facts in the case may serve to convince His Highness the Chancellor that the Federal Council never had the intention, with which it is credited, of making the admission of Germans into Switzerland depend upon the permission of the German Government, nor did it expect to claim for itself a reciprocal right in respect to the Swiss who take up their residence in Germany. Although it is true, as the dispatch of June 26 remarks, that every international treaty, to the extent of the rights it creates and the obligations it imposes, implies the relinquishment by each of the contracting parties of a part of its sovereignty, it is not less certain that there are some attributes of her sovereignty that Switzerland has not, nor ever will, of her own free will, agree to abandon by treaty stipulation. The preservation of the right of asylum is one of these attributes, as is shown by the whole course of Swiss history. This constitutes one of the principles from which we cannot depart, and by which we shall be governed if we enter into negotiations with Germany for the conclusion of a new treaty of settlement. This reminder appears necessary to us.

“In his preceding communications, the undersigned has discussed the means proposed to prevent anarchists and revolutionists from using Swiss territory as a base to conspire against the material security of Germany, and the measures intended to suppress the plots which unfortunately occur in spite of the precautions taken.

“The Federal Council can only repeat the categorical declarations which it has made in reference to this subject. Recognizing

to their fullest extent the international duties which rest upon the Confederation as well as upon every government desirous of maintaining good relations with friendly states, the Federal Council has, in every instance, given evidence, by its acts, of its firm intention not to tolerate in Switzerland any acts contrary to the law of nations or to the respect which states owe to one another. This action is but the expression of the will of the Swiss people, manifested in this particular instance by the unanimous votes of the Federal Chambers, when appeal was made to their legislative concurrence.

"At the present time, thanks to the vigorous measures employed in the last few years, no recognized anarchist or revolutionist leader is settled or allowed in Switzerland. The creation of a central bureau of political supervision [*police politique*] consequent upon the decision taken by the Chambers at their last session will make it possible the better to keep track of and repress, in so far as is allowed by our constitution, all illicit or dangerous activity, whether in the press or on the part of societies and meetings, when of a nature to menace the maintenance of good relations with other nations.

"The Federal Council does not doubt that these explanations will be of a nature completely to reassure the German Government and convince it that there is no need of having recourse to exceptional measures contrary to the interests of the two states. That we insist with so much firmness upon the respect for our rights is because our intention is not less firm to fulfill scrupulously our international duties, especially in regard to Germany, with whom we have always been desirous of maintaining the best relations.

"The undersigned begs His Excellency, M. von Bülow, to bring that which precedes to the attention of His Highness, Prince Bismarck, and to accept the assurance of his consideration."

After the receipt of the Swiss note of July 13, the German Government, on July 20, formally denounced the treaty of April 27, 1876, in accordance with its article 11, so that it expired one year from that date, on July 20, 1890.

On July 31, the German Government in a note to the Swiss



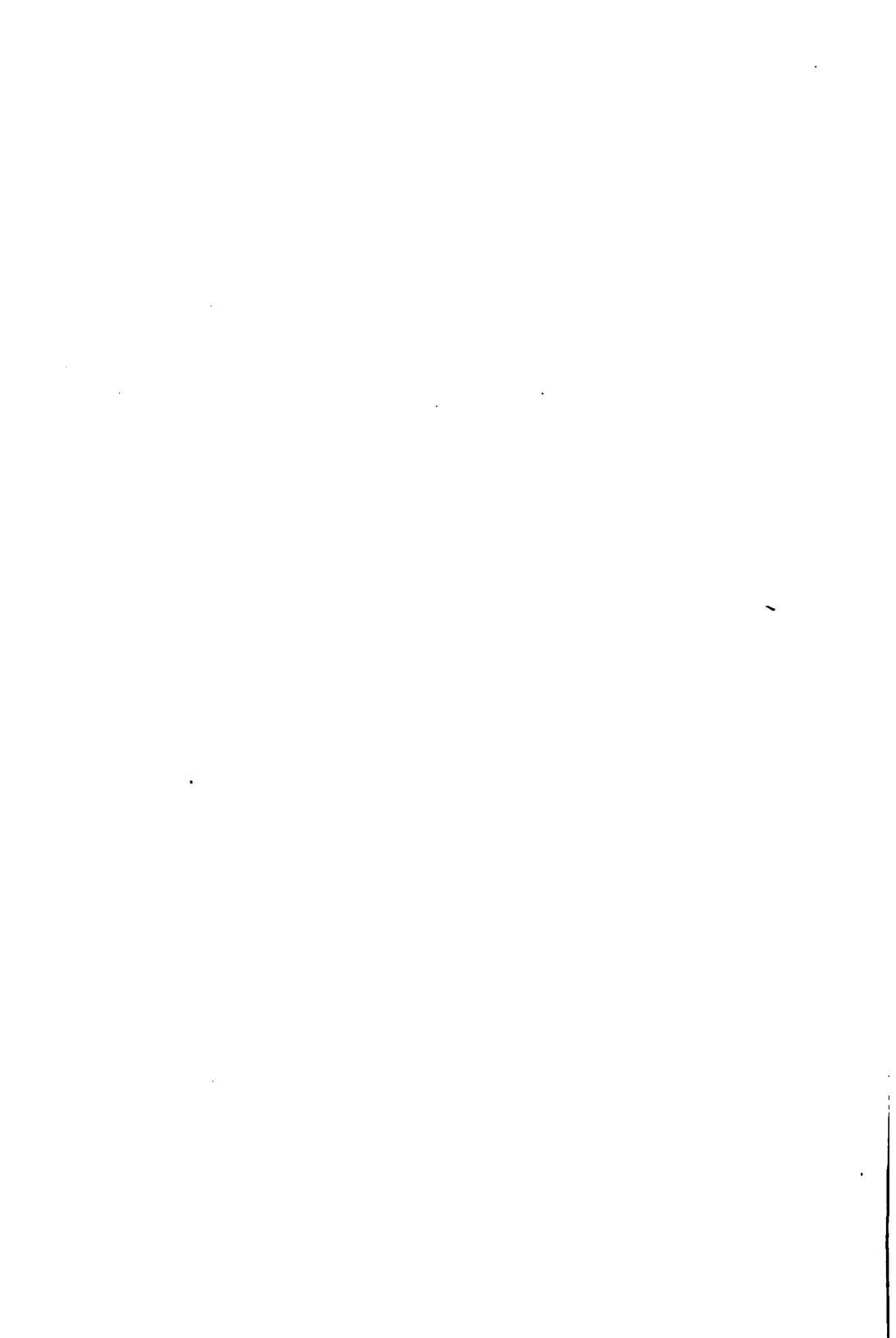
Government maintained its views as previously set forth and considered that the Socialists could not be looked upon as political refugees enjoying an asylum in Switzerland, but that they had gone there of their own free will for the purpose of intriguing against the German Empire. The question of Switzerland's violation of her neutralization was not mentioned, but the Chancellor expressed the hope that a new treaty of settlement might be entered into. A new treaty was in fact concluded to replace the old one before the date of its expiration.

(*Archives Diplomatiques*, 2d series, vol. XXXI, pp. 332-41. Schulthess: *Europäischer Geschichtskalender* [1889], vol. XXX, pp. 96, 97, 104-05, 112, 143-44, 259; C. K. Hoffmann: *Het Conflict tusschen Zwitserland en Duitschland in 1889* [Leiden, 1891]. Cf. also Hilty, *Politisches Jahrbuch der schweizerischen Eidgenossenschaft* [1889], pp. 477-95; [1890], pp. 628-34, where the question is ably discussed in German from the Swiss point of view, but in an impartial spirit.)

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## THE EFFECT OF WAR ON TREATIES

It is a well-recognized principle that war terminates certain treaties. This subject does not fall within the scope of this volume.



## **PART II**

**THE LAW OF NATIONS: SUBSTANTIVE INTERNATIONAL LAW RECOGNIZED BY GOVERNMENTS AS A RULE OF CONDUCT BINDING UPON THEM AND OBSERVED BY THEM IN PRACTICE**



## CHAPTER IV

### THE EQUALITY OF STATES

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#### § 18. SOVEREIGNTY, INDEPENDENCE, AND EQUALITY

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THE first thing that strikes the observant student of the practice of diplomacy is not that alleged equality of states which is made the basis of all treatises on the law of nations. On the contrary, at every turn he meets countless instances where inequalities are recognized in the relations between states. Here it is necessary to make a distinction. Whenever a matter falls within the province of international law, it means that all states, great and small, may expect to be equal as regards its application to their affairs. In the words of the great Marshall, "No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone." But in the realm of politics, where states great and small debate and maintain their different views, the very fact that they are concerned with politics or policies means that there is as yet no agreement among the nations which can be incorporated into the body of international law. In such instances, the power of the government of the mightier state makes its views felt in shaping the rule of the law of nations, which shall be agreed upon in the end to settle the conflict of policies and to regulate the question in dispute. As Westlake has so well said: "Therefore from time to time new rules have to be proposed on reasonable grounds, acted on provisionally, and ultimately adopted or rejected as may be determined by experience, including the effect, not less important in international than in national affairs, of interest coupled with

preponderating power." (Westlake: *International Law*, part 1, *Peace* [Cambridge, 1910], p. 15.)

It would indeed be a most top-heavy system which should attempt to establish law without regard to the strength of opinion upon which it must rely for its maintenance. In due course, as the recognized principles are better understood, and as the spirit of equitable compromise, which is the basis for agreement upon all new law or regulation, is more skillfully and reasonably applied, the extension of international law will grow apace. Let us not be impatient and attempt to be over-hasty in this process, for the successful accomplishment of which so much wisdom and so much experience are necessary. If we clothe policy with the robes of law, policy it will still remain, but the effect may be to discredit the principles of the real law of nations which lie at the very foundation of individual security.

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(a) Sovereignty

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### AN ARREST IN CANADA (1863)

ON April 15, 1863, Mr. Seward, Secretary of State of the United States, wrote to Mr. Stanton, Secretary of War: "I have carefully examined the report of John A. Haddock, captain commanding Company E, 35th Regiment of New York Volunteers, concerning his arrest of Ebenezer Tyler, a deserter from the forces of the United States, within unquestioned Canadian territories of Great Britain. The violation of the sovereignty of a friendly State was doubtless committed under the influence of an earnest zeal for the interests of the United States, but that motive cannot diminish the wrongfulness of the act or furnish excuse for this government to that of Great Britain. Having submitted the matter to the President, I am instructed by him to disavow with regret the proceeding of Captain Haddock, and to inform the British Government that the captain will be dismissed from the public service and that the deserter Ebenezer Tyler will be discharged from his enlistment in the volunteer forces of the United States."

(Moore: *Digest of International Law*, vol. II, p. 370.)

(b) Independence

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THE ZAPPA INCIDENT (1891)

THE most remarkable incident that has occurred of late years on the question is that between Greece and Roumania, of the succession to Vanghely Zappa, by birth a Greek of Ottoman nationality, but who had obtained what is called the little naturalization in Roumania. He bequeathed his immovable property to a public purpose in Greece, subject to a life interest which ended in 1891, whereupon the Greek Government claimed to be put in possession of the inheritance in Roumania by the Greek Consulate there. At the same time the nephews of the testator claimed the possession in the national court of first instance at Bukharest, on the ground that only Roumanians were allowed by a law of 1879 to acquire immovables in country districts, and then the Roumanian Government intervened in the same court to claim the succession as vacant. The Greek Government, by a note of May 16/28, 1892, expressed "its surprise that the Roumanian state persisted in desiring to bring differences between states to the judgment of the national courts," and withdrew its representative from Bukharest, a step which led to a long interruption of diplomatic intercourse between the two states, each of which published opinions given in its favor by eminent international jurists. The faculty of law of the University of Berlin gave an opinion which is specially worthy of mention. It was that national courts are not competent as between states in matters of civil right arising out of international treaties, but are so in matters arising from pure private law, so far as regards the *forum rei sitæ*, the *forum hereditatis*, and the *forum prorogatum*.

(Extract from Westlake: *International Law*, part 1, *Peace* [Cambridge, 1910], p. 251.)

## UNDERHILL v. HERNANDEZ

*The Supreme Court of the United States, 1897*

IN the early part of 1892 a revolution was initiated in Venezuela against the administration thereof, which the revolutionists claimed had ceased to be the legitimate government. . . . General Hernandez belonged to the anti-Administration party, and commanded its forces in the vicinity of Ciudad Bolivar. In October the party in revolt had achieved success generally, taking possession of the capital of Venezuela October 6, and on October 23, 1892, the Crespo Government, so called, was formally recognized as the legitimate Government of Venezuela by the United States.

George F. Underhill, . . . a citizen of the United States, who had constructed a waterworks system for the city of Bolivar under a contract with the government and was engaged in supplying the place with water, . . . some time after the entry of General Hernandez, . . . applied to him as the officer in command for a passport to leave the city. Hernandez refused this request, and requests made by others in Underhill's behalf, until October 18, when a passport was given and Underhill left the country.

This action was brought to recover damages for the detention caused by reason of the refusal to grant the passport; for the alleged confinement of Underhill to his own house; and for certain alleged assaults and affronts by the officers of Hernandez' army.

The cause was tried in the Circuit Court of the United States for the Eastern District of New York, and on the conclusion of plaintiff's case, the Circuit Court ruled that upon the facts plaintiff was not entitled to recover, and directed a verdict for defendant, on the ground that "because the acts of defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor." Judgment having been rendered for defendant, the case was taken to the Circuit Court of Appeals, and by that court affirmed upon the ground "that the acts of the defendant were the acts of the Government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." (26



U.S. App. 573.) Thereupon the cause was brought to this court on *certiorari*. . . .

*Mr. Chief Justice Fuller*, after stating the case, delivered the opinion of the court:

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

"Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact. Where a civil war prevails, that is, where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military force, generally speaking, foreign nations do not assume to judge of the merits of the quarrel. If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation. If the political revolt fails of success, still if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability. [References omitted.]

"Revolutions or insurrections may inconvenience other nations, but by accommodation to the facts the application of settled rules is readily reached. And where the fact of the existence of war is in issue in the instance of complaint of acts committed within foreign territory, it is not an absolute prerequisite that that fact should be made out by an acknowledgment of belligerency, as other official recognition of its existence may be sufficient proof thereof. (*The Three Friends*, 166 U.S. 1)

"In this case, the archives of the State Department show that civil war was flagrant in Venezuela from the spring of 1892; that

the revolution was successful; and that the revolutionary government was recognized by the United States as the government of the country, it being, to use the language of the Secretary of State in a communication to our Minister to Venezuela, 'accepted by the people, in the possession of the power of the nation and fully established.'

"That these were facts of which the court is bound to take judicial notice, and for information as to which it may consult the Department of State, there can be no doubt. (*Jones v. United States*, 137 U.S. 202; *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149.)

"It is idle to argue that the proceedings of those who thus triumphed should be treated as the acts of banditti or mere mobs.

"We entertain no doubt upon the evidence that Hernandez was carrying on military operations in support of the revolutionary party. It may be that adherents of that side of the controversy in the particular locality where Hernandez was the leader of the movement entertained a preference for him as the future executive head of the nation, but that is beside the question. The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States. We think the Circuit Court of Appeals was justified in concluding 'that the acts of the defendant were the acts of the Government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.'

"The decisions cited on plaintiff's behalf are not in point. Cases respecting arrests by military authority in the absence of the prevalence of war; or the validity of contracts between individuals entered into in aid of insurrection; or the right of revolutionary bodies to vex the commerce of the world on its common highway without incurring the penalties denounced on piracy; and the like, do not involve the questions presented here.

"We agree with the Circuit Court of Appeals, that 'the evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces,' and that 'it was not suf-

ficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive;' and we concur in its disposition of the rulings below. The decree of the Circuit Court is affirmed."

(Extract from *United States Reports*, vol. 168, pp. 250-54, with reporter's statement of facts abbreviated.)

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### THE BRAZILIAN COFFEE CASE (1912)

IN this suit, which was begun in 1912 in the District Court for the Southern District of New York as *United States v. Herman Sielcken*, but which was afterwards discontinued, the chief point at issue was the power of the Government of the United States to proceed against the property of a foreign state, warehoused in New York, on the ground of violation of the Sherman Anti-Trust Act. The facts were as follows:

More than three-fourths of the world's coffee is raised in Brazil, the greater part of it in the State of São Paulo. In 1906 there was an abnormal crop, almost equal to the production of the two preceding years put together, with the result that the coffee market was demoralized and the planters threatened with bankruptcy. To remedy conditions, the Government of São Paulo formed the so-called "valorization scheme," whereby the State was to take over such part of the surplus coffee as could not otherwise be marketed to advantage, withhold it from the market for the time being, and regulate its sale later. The plan further provided for the limitation of the acreage under coffee cultivation, for the fixation of a minimum price in Brazilian markets, for the checking of exportation of inferior coffee, and for the raising of loans on the security of the coffee purchased.

After some temporary financial operations, São Paulo in 1908 borrowed £15,000,000 from London and Paris bankers "to liquidate the operations effected for the valorization of coffee." This loan was guaranteed by the Federal Government of Brazil and was secured by the coffee still unsold and by an export tax on coffee of five francs. The agreement with the bankers called for the sale of this coffee within ten years, under the control of a com-

mittee of seven, meeting in London, one of whom was a representative of the Government of São Paulo with power to veto all decisions of the committee. Approximately 7,000,000 bags of coffee were delivered to the committee, about a fourth of which was assigned for sale in the United States. All sales were to be made in the name of the Government of São Paulo, which was under obligation to sell a minimum amount every year, and more if market conditions warranted.

On an examination into the facts, the Department of Justice of the United States considered that the operations of the committee were in restraint of trade and suit was entered against the defendant, Herman Sielcken, as the representative of the committee in the United States. As a preliminary step, the Attorney-General sought, under the Sherman Act, to seize 950,000 bags of coffee, stored in New York and controlled by the committee, and to hold this coffee pending the result of the suit, but the temporary injunction was refused.

In its petition, the government argued that the facts pleaded constituted a violation of the Anti-Trust Act. Acts and agreements unlawful under statutes of the United States could not become lawful because they were "not unlawful in Brazil and were participated in by a foreign state." Though courts would not, in general, exercise jurisdiction over the person or property of a foreign sovereign, such jurisdiction would be assumed if "the foreign state engages in a business transaction, as its rights then are not superior to those of an individual citizen." Accordingly, the petition prayed:

- "1. That the acts set forth in the petition be declared to be violative of the Anti-Trust Act, and that all claims, either to the title or possession of the coffee, be declared illegal and void.
- "2. That the acts of the committee in the United States be declared unlawful. (This would include all the sales heretofore made.)
- "3. That the defendant, Sielcken, be restrained from further withholding any of the American coffee from the market or from imposing conditions in its sale.

"4 and 5. That a preliminary injunction be granted and that a receiver be appointed, with power to sell."

On demurrer, the brief for the defendant set forth the following points:<sup>1</sup>

1. The courts of the United States had no jurisdiction because the property of a foreign state was involved. "Sovereign states stand on a basis of absolute equality, and all differences between them must be adjusted through the ordinary channels of diplomacy, by the executive departments of the governments. One sovereign will not subject another to the indignity of requiring him to answer for his acts in the courts; and it makes no difference whether the question involved concerns the person or property of the sovereign." In this case, the coffee was the property of São Paulo and guaranteed by the Republic of Brazil. "It can, therefore, no more be interfered with by the courts of this country than could the Ambassador of Brazil, if he were here in person attempting to do an act contrary to the laws of this country." The Sherman Act was no more applicable to a foreign sovereign than any provision of the Criminal Code, nor could the property of the Brazilian state be seized and condemned to sale "simply because it is incidentally found in our harbor, in the custody of an agent of that Republic, who appears by the complaint to be acting strictly within his orders received from it."

2. Nothing in violation of the Sherman Act had been done in the United States. The economic policy adopted by São Paulo was lawful in Brazil and every act was controlled by the law of the place where it was done. If it gave rise to no rights or liabilities within that jurisdiction, "no rights can be asserted or liabilities enforced in consequence of that act in the courts of another jurisdiction, even though the act would have given rise to rights and liabilities if done there." This had been the uniform rule in the courts of the United States. (See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347.) The only act done affecting the United States was the shipment of the coffee to New York for sale. That was not illegal, nor was it illegal to hold property lawfully

<sup>1</sup> Counsel for the defendant were Messrs. Joseph H. Choate and John A. Garver. The brief has been kindly furnished by Mr. Garver.

acquired until such time as it could be sold at an advantageous price.

3. There was defect of parties defendant. The two states whose property rights were involved had not had an opportunity to be heard. "To seize this coffee and sell it at a forced sale would be such an act of overt hostility that no self-respecting government could fail to resent it."

While the case was pending, the government found the scope of the Sherman Act too narrow to admit of a successful prosecution of the suit. However, on the understanding that meanwhile the coffee remain unsold, negotiations were opened with Brazil with the result that by agreement the "valorized" coffee was put on the market, on condition that the proceedings instituted by the Government of the United States be discontinued.

(*American Journal of International Law* [1912], vol. VI, pp. 702-06; *Journal of Political Economy* [1913], vol. XXI, pp. 162-63; Defendant's *Brief and Affidavit*.)

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(c) Equality

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UNITED STATES AND COLOMBIA (1888)

ON April 28, 1888, Mr. Bayard, Secretary of State for the United States, wrote to Mr. Walker, American Chargé at Bogota: "Citizens of the United States in Colombia are exempted from paying any tax from which the subjects or citizens of another power are exempt, both by the 'favored nation' clause of our treaty of 1846 with Colombia, and by the general principle of the law of nations which justifies this government in insisting that there shall be no undue discrimination against citizens of the United States wherever they may be resident."

(Moore: *Digest of International Law*, vol. II, p. 57.)

(d) Respect

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RESPECT FOR THE AMERICAN FLAG IN GREECE

*The Acting Secretary of State to Minister Moses*

DEPARTMENT OF STATE,  
Washington, June 18, 1909.

*Sir:* The Department is advised that in Piræus the American flag is extensively used by Greeks who have returned from a sojourn in America in advertisement of saloons and cigar stores. It seems probable that this custom also prevails in other parts of Greece. You will, therefore, bring this matter to the attention of the Foreign Office, and say that the Department is desirous of the coöperation of the Greek Government in preventing this abuse and disgrace of the national emblem of the United States, and confidently trusts that measures looking toward this end will be taken or sanctioned by the Greek Government.

In this connection you will call to the attention of the Foreign Office a similar case which arose in Brazil in the year 1864, wherein the American Minister, with the consent and approval of the Brazilian Government, issued a circular, directed to the United States Consuls under his jurisdiction, prohibiting the flying of the American flag in Brazil except by those in official capacities or by other persons who should have previously received the permission of the United States Minister for so doing. Reference to this case will be found in Moore's *Digest of International Law*, volume 2, at page 135.

The Department expects that, in conjunction with the Foreign Office, you will devise means to put a stop to this abuse of the flag of the United States.

I am, etc.,

HUNTINGTON WILSON.

*Minister Moses to the Secretary of State*

AMERICAN LEGATION,  
Athens, October 18, 1909.

*Sir:* Referring to your instruction No. 4, of June 18 ultimo (file No. 697/43), I have the honor to report that, having called

the matter to the attention of the Greek Government, I have received from the Minister for Foreign Affairs a communication upon the subject, a copy of which, with translation, is enclosed herewith. . . .

I have, etc.,

GEO. H. MOSES.

[Enclosure — Translation]

*The Minister for Foreign Affairs to Minister Moses.*

THE FOREIGN OFFICE,  
Athens, September 28, 1909.

*Mr. Minister:* Taking note of the steps which you have taken with me toward the suppression of the abuse of the American flag by its display over the saloons and wineshops at the Piræus, I hasten to bring to your knowledge that the director of police of the neighboring city has received orders to exercise strict watch and prevent the abuse in question.

K. B. MAVROMICHALIS.

(*Foreign Relations of the United States, 1909, pp. 337-38.*)

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## § 19. RECOGNITION

### (a) New States

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#### THE UNITED STATES AND BUENOS AYRES (1818)

ON August 24, 1818, Mr. Adams, Secretary of State, wrote to the President: "In the draft of a letter to Mr. Aguirre . . . I have stated to him the grounds upon which the Government of the United States have been deterred from an acknowledgment of that of Buenos Ayres as including the dominion of the whole viceroyalty of the La Plata. The result of the late campaign in Venezuela, by comparing the royal and the republican bulletins, has been so far disadvantageous to the latter that they have undoubtedly failed in obtaining possession of any part of the coast. They have, therefore, at least one more campaign to contest, to go through, for which they will need several months of preparation.



Bolivar appears to have resigned the chief military command to Paez, and the army is to be reorganized. But the royalists do not appear to have gained any ground, and are evidently too much weakened by their losses to act upon the offensive. In this state the independence of Venezuela can scarcely be considered in a condition to claim the recognition of neutral powers. But there is a stage in such contests when the parties struggling for independence have, as I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when independence is established as a matter of fact so as to leave the chances of the opposite party to recover their dominion utterly desperate. The neutral nation must, of course, judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral and to make it a cause or pretext for war, as Great Britain did expressly against France in our Revolution, and substantially against Holland. If war thus results in point of fact from the measure of recognizing a contested independence, the moral right or wrong of the war depends upon the justice and sincerity and prudence with which the recognizing nation took the step. I am satisfied that the cause of the South Americans, so far as it consists in the assertion of independence against Spain, is just. But the justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty. The neutral may, indeed, infer the right from the fact, but not the fact from the right. If Buenos Ayres confined its demand of recognition to the provinces of which it is in actual possession, and if it would assert its entire independence by agreeing to place the United States upon the footing of the most favored nation, . . . I should think the time now arrived when its government might be recognized without a breach of neutrality."

(Moore: *Digest of International Law*, vol. I, pp. 78-79.)

**(b) New Governments**

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**THE FRENCH REPUBLIC (1848)**

FEBRUARY 24, 1848, Mr. Rush, United States Minister at Paris, wrote that the attempt of the government to enforce with troops an interdict forbidding a "reform banquet," which was to have been held by the opposition members of the Chamber of Deputies and others, had produced a state of things "little short of revolutionary." Even as he wrote cavalry were hastily passing through the streets within his hearing, and rumors were flying that the King had abdicated and that the Count of Paris was proclaimed. Scarcely had he folded his dispatch, when the revolution was accomplished and the monarchy overthrown. The King abdicated and fled with the royal family, and all attempts to establish a regency, with the Count of Paris as successor to the throne, failed. A provisional government was immediately formed. It was proclaimed on the morning of Friday, the 25th, the proclamation declaring that the Provisional Government desired a republic, subject to the ratification of the French people. On Saturday, the 26th, Mr. Rush received an intimation that his "personal presence at the Hôtel de Ville, to cheer and felicitate the Provisional Government, would be acceptable." Before the day was out he imparted his determination to take the step. Monday, the 28th, was appointed for it, and on that day he repaired to the Hôtel de Ville, accompanied by his secretary of legation, and delivered to the President and other members of the Provisional Government there assembled an address of congratulation. On the same day he acknowledged a note written by M. Lamartine, as Minister of Foreign Affairs of "the Provisional Government of the French Republic," and stated that, pending the receipt of instructions, he would be ready to transact with him whatever business might appertain to the United States or to its citizens in France.

Mr. Buchanan, in transmitting to Mr. Rush a letter of credence to the French Republic, said:

"It was right and proper that the envoy extraordinary and minister plenipotentiary from the United States should be the

first to recognize, so far as his powers extended, the Provisional Government of the French Republic. Indeed, had the representative of any other nation preceded you in this good work, it would have been regretted by the President. . . . In its intercourse with foreign nations the Government of the United States has, from its origin, always recognized *de facto* governments. We recognize the right of all nations to create and re-form their political institutions according to their own will and pleasure. We do not go behind the existing government to involve ourselves in the question of legitimacy. It is sufficient for us to know that a government exists capable of maintaining itself; and then its recognition on our part inevitably follows. This principle of action, resulting from our sacred regard for the independence of nations, has occasioned some strange anomalies in our history. The Pope, the Emperor of Russia, and President Jackson were the only authorities on earth which ever recognized Dom Miguel as King of Portugal.

"Whilst this is our settled policy, it does not follow that we can ever be indifferent spectators to the progress of liberty throughout the world, and especially in France. We can never forget the obligations which we owe to that generous nation for their aid at the darkest period of our Revolutionary War in achieving our own independence. . . . It was, therefore, with one universal burst of enthusiasm that the American people hailed the late glorious revolution in France in favor of liberty and republican government. In this feeling the President strongly sympathizes. Warm aspirations for the success of the new Republic are breathed from every heart."

President Polk, in a special message to Congress, spoke in similar terms, saying that Mr. Rush, called upon to act in a sudden emergency, which could not have been anticipated by his instructions, "judged rightly of the feelings and sentiments of his government and of his countrymen, when, in advance of the diplomatic representatives of other countries, he was the first to recognize, so far as it was in his power, the free government established by the French people.

"The policy of the United States has ever been that of non-intervention in the domestic affairs of other countries, leaving

to each to establish the form of government of its own choice. While this wise policy will be maintained toward France, now suddenly transformed from a monarchy into a republic, all our sympathies are naturally enlisted on the side of a great people, who imitating our example, have resolved to be free."

Congress, by a joint resolution, tendered its congratulations, in the name of the American people, "to the people of France, upon the success of their recent efforts to consolidate the principles of liberty in a republican form of government," and requested the President to transmit the resolution to the American Minister at Paris, with instructions to present it to the French Government.

(Extract from Moore: *Digest of International Law*, vol. 1, pp. 123-25.)

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## § 20. STATE SUCCESSION

### (a) Things and obligations

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## THE SAPPHIRE

*The Supreme Court of the United States, 1871*

THIS was an appeal from the Circuit Court of the United States for the District of California.

The case was one of collision between the American ship *Sapphire* and the French transport *Euryale*, which took place in the harbor of San Francisco on the morning of December 22, 1867, by which the *Euryale* was considerably damaged. A libel was filed in the District Court two days afterwards, in the name of the Emperor Napoleon III, then Emperor of the French, as owner of the *Euryale*, against the *Sapphire*. The claimants filed an answer, alleging among other things that the damage was occasioned by the fault of the *Euryale*. Depositions were taken, and the court decreed in favor of the libelant and awarded him \$15,000, the total amount claimed. The claimants appealed to the Circuit Court, which affirmed the decree. They then, in July, 1869, appealed to this court. In the summer of 1870 Napoleon III was deposed. The case came on to be argued here February 16, 1871. Three questions were raised:

1. The right of the Emperor of France to have brought suit in our courts.
2. Whether, if rightly brought, the suit had not become abated by the deposition of the Emperor Napoleon III.
3. The question of merits; one of fact, and depending upon evidence stated toward the conclusion of the opinion, where the point is considered. . . .

*Mr. Justice Bradley* delivered the opinion of the court:

"The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the Third Circuit by Justice Washington and Judge Peters in 1810. The Constitution expressly extends the judicial power to controversies between a state, or citizens thereof, and foreign states, citizens, or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late Civil War. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit.

"The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the *Euryale*, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor,

or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such inures to his successors in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the *Euryale* has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation.

"If a special case should arise in which it could be shown that injustice to the other party would ensue from a continuance of the proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result.

"The remaining question relates to the merits of the case. . . .

"Decree of the Circuit Court reversed, and the cause remitted to that court with directions to enter a decree in conformity with this opinion."

(Wallace: *Cases argued and adjudged in the Supreme Court of the United States*, vol. XI, pp. 164-71.)

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### THE CUBAN DEBT (1898)

By the protocol of armistice between the United States and Spain, signed at Washington August 12, 1898, it was provided:

"Article 1. Spain will relinquish all claim of sovereignty over and title to Cuba.

"Article 2. Spain will cede to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also an island in the Ladrões to be selected by the United States."

In the peace negotiations at Paris, the American Commission-

ers, October 3, 1898, proposed the insertion in the definitive treaty of the following clauses:

"The Government of Spain hereby relinquishes all claim of sovereignty over and title to Cuba."

"The Government of Spain hereby cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the Island of Guam, in the Ladrones."

The Spanish Commissioners submitted, October 7, 1898, a counter-proposal, by which Spain was to relinquish her sovereignty over Cuba and transfer it to the United States, and by which the "relinquishment and transfer" were declared to embrace "all the prerogatives, powers, and rights" of Spain over the island and its inhabitants, and "all charges and obligations of every kind in existence at the time of the ratification of this treaty of peace, which the Crown of Spain and her authorities in the Island of Cuba may have contracted lawfully in the exercise of the sovereignty hereby relinquished and transferred, and which as such constitute an integral part thereof." For the purpose of ascertaining what were such "charges and obligations," it was proposed to be laid down that they "must have been levied and imposed in constitutional form and in the exercise of its legitimate powers by the Crown of Spain, as the sovereign of the Island of Cuba, or by its lawful authorities in the exercise of their respective powers prior to the ratification of this treaty," and that they must have been created "for the service of the Island of Cuba, or chargeable to its own individual treasury." It was, however, to be expressly declared that they should, within these limitations, include "all debts, of whatsoever kind, lawful charges, the salaries or allowances of all employees, civil and ecclesiastical, who shall continue to render services in the Island of Cuba, and all pensions in the civil and military services, and of widows and orphans."

And it was proposed that similar stipulations should be inserted with regard to Porto Rico.

The American Commissioners, October 11, 1898, rejected these proposals, on the ground that they appeared to convey not a proposition to "relinquish all claim of sovereignty over and title to Cuba," but in substance a proposition to "transfer" to the United

States and in turn to Cuba "a mass of Spanish obligations and charges." "It is difficult," added the American Commissioners, "to perceive by what logic an indebtedness contracted for any purpose can be deemed part of the sovereignty of Spain over the Island of Cuba. In the article proposed it is attempted to yoke with the transfer of sovereignty an obligation to assume an indebtedness arising out of the relations of Spain to Cuba. The unconditional relinquishment of sovereignty by Spain stipulated for in the protocol is to be changed into an engagement by the United States to accept the sovereignty burdened with a large mass of outstanding indebtedness. It is proper to say that if during the negotiations resulting in the conclusion of the protocol Spain had proposed to add to it stipulations in regard to Cuba such as those now put forward, the proposal, unless abandoned, would have terminated the negotiations. The American Commissioners, therefore, speaking for their government, must decline to accept the burden which it is now proposed shall be gratuitously assumed."<sup>1</sup>

(Extract from Moore: *Digest of International Law*, vol. 1, pp. 351-52. Professor Moore was a member of the commission.)

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(b) Allegiance

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THE NATIONALITY OF THE FRENCH RESIDENTS OF  
ALSACE-LORRAINE (1871)

As Thiers declared in the National Assembly, December 20, 1871, the French plenipotentiaries at Frankfort contended that only those who were domiciled in Alsace-Lorraine at the date of the signature of the preliminaries [of peace] should be considered as becoming German subjects as a result of the conquest. The adoption of this criterion would prevent many difficulties, since it would be easier to bring the terms of the treaty to the attention

<sup>1</sup> In the fuller development of these arguments, which will be found in Moore (*Digest of International Law*, vol. 1, p. 351 ff.), the United States successfully maintained this attitude, which was eventually accepted by Spain. For reference to the authorities discussing this question, see Hershey: *Essentials of International Public Law*, p. 135.



of all those domiciled in Alsace than it would be to reach those who had been born there. But the Germans, influenced probably by the idea that Alsace had been formerly a part of the Holy Roman Empire and that the Alsatians and Lorrainers were of German blood, looked at the question from an ethnical point of view and claimed as German subjects all those born on the ceded territory.

The Treaty of Frankfort of May 10, 1871, has the following stipulation regarding this matter (article 2):

"French subjects, natives of the ceded territories, actually domiciled in that territory, who wish to retain their nationality, shall have until the 1st of October, 1872, to change their domicile to France and to establish themselves there, upon condition of their making a previous declaration to that effect before the competent authorities. This right may not be affected by laws in regard to military service. Those who remove to France, in accordance with this provision, shall retain their French citizenship."

The French Government tried to secure as restricted an application as possible for the word native (*originaire*), but were fain to agree by article 1 of the additional convention to the Treaty of Frankfort that the natives even though not domiciled (in the ceded territory) could not retain their French nationality without declaration; so that every native of Alsace-Lorraine, in whatever part of the world he might be, could only avoid becoming a German subject by making the prescribed declaration.

Another and more serious difference of opinion arose in regard to the inhabitants of the ceded provinces who were natives of other French departments. The German Government did not exact a declaration from individuals in this category in order to preserve their nationality, — that would have been manifestly contrary to the terms of the treaty, — but announced its intention of requiring them to transfer their domicile to France. The French Government had always believed the cession would not affect the nationality of this class.

In a note of September 1, 1872, to the French Minister for Foreign Affairs, the German Ambassador set forth the views of his government:

"The German Government has from the first considered that, by the mere fact of the cession of Alsace and Lorraine to Germany, the inhabitants of French nationality became German, without there being any need that this should be expressly stipulated in the treaty of peace; and article 2, as Germany looked at it, had no other meaning or aim than to fix the conditions by the observance of which a certain category of inhabitants might escape from this natural consequence of the cession. In requiring these latter to make a formal declaration in favor of France and to transfer their actual residence [*domicile effectif*], the German Government did not, however, intend to dispense with the requirement of any formality from another category of individuals who also became German in consequence of the cession, in case they desire to recover their former nationality."

A note was inserted in the *Official Journal* of September 14, 1872, to bring to the attention of those concerned this difference of interpretation that they might have time to act upon it before the expiration of the delay.

(Condensed and translated from G. Cogordan: *La Nationalité* [2d ed., Paris, 1900], pp. 359-64.)

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(c) Property rights of individuals

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### THE CANAL ZONE SQUATTERS (1913)

In accordance with the terms of article 15 of the treaty between the United States and Panama signed November 18, 1903, and ratified February 26, 1904, the President of Panama in January, 1913, appointed the Honorable Federico Boyd, a former President of the Republic, and the Honorable Samuel Lewis, a former Minister of Foreign Affairs, to represent the Republic of Panama on the joint commission under the treaty. At the same time President Taft appointed Dr. Roland P. Falkner, of Washington, D.C., and Dr. L. S. Rowe, of the University of Pennsylvania, to represent the United States. The American Commissioners arrived on the Isthmus in February and on the 1st of March the first formal meeting of the commission was held.

The competence and purpose of the commission were defined by article 6 of the treaty:

"The grants herein contained shall in no manner invalidate the titles or rights of private landholders or owners of private property in the said zone or in or to any of the lands or waters granted to the United States by the provisions of any article of this treaty, nor shall they interfere with the rights of way over the public roads passing through the said zone or over any of the said lands or waters unless said rights of way or private rights shall conflict with rights herein granted to the United States, in which case the rights of the United States shall be superior. All damages caused to the owners of private lands or private property of any kind by reason of the grants contained in this treaty or by reason of the operations of the United States, its agents or employees, or by reason of the construction, maintenance, operation, sanitation, and protection of the said canal or of the works of sanitation and protection herein provided for, shall be appraised and settled by a joint commission appointed by the Governments of the United States and the Republic of Panama, whose decisions as to such damages shall be final, and whose awards as to such damages shall be paid solely by the United States. No part of the work on said canal or the Panama Railroad or on any auxiliary works relating thereto and authorized by the terms of this treaty shall be prevented, delayed or impeded by or pending such proceedings to ascertain such damages. The appraisal of said private lands and private property and the assessment of damages to them shall be based upon their value before the date of this convention."

The most important question confronting the commission related to the status of settlers or occupiers of public lands in the Canal Zone, who went upon such lands prior to the conclusion of the Treaty of February 26, 1904. Under the Colombian law which prevailed in the Canal Zone prior to the independence of the Republic of Panama, and which continued in force while the Republic of Panama exercised jurisdiction over the Canal Zone, occupiers of, or squatters on, public lands, were entitled to compensation for the value of their improvements if for any reason they were ousted from such lands. Counsel for the United States strenuously contended that the transfer of the political jurisdic-

tion over the Canal Zone to the United States destroyed any rights that might have been acquired by settlers or occupiers under the Colombian law. It was argued that under the general principles of American jurisprudence unauthorized occupiers of public lands are mere trespassers, and that a trespass cannot be made the foundation of a right. Great legal acumen was displayed by counsel both for the United States and the parties in interest, and after an exhaustive argument before the commission and prolonged deliberation within the commission the conclusion was finally reached by unanimous vote that settlers or occupiers of public lands in the Canal Zone, who went upon such lands prior to the conclusion of the Treaty of February 26, 1904, were entitled to compensation for the value of the improvements which they had made on such lands. The opinion establishing this principle reads as follows:

"With reference to the status of such occupiers, it is clear that under the provisions of the Laws of the United States of Colombia and subsequently of the Republic of Panama, cultivators on public lands acquire a right to compensation for improvements, which rights were not divested by anything contained in the Treaty of November 18, 1903, or by the change of sovereignty affected by that treaty.

"The rights of occupiers on public lands of the United States of Colombia to compensation for improvements made thereon, are governed by law No. 48 of 1882. . . ."

After quoting the terms of the law and referring to decisions of the courts of the Canal Zone, the commission made the following rule to govern the award of damages in particular instances: "In all those cases in which rights accrued prior to November 18, 1903, to occupiers or settlers on public lands, such rights were not divested by the Treaty of November 18, 1903, and . . . such settlers or occupiers are entitled to compensation for such rights as have accrued."

(Prepared from an article by Dr. Leo S. Rowe, a member of the commission, in *The American Journal of International Law* [1914], vol. VIII, pp. 738-42.)

## § 21. SERVITUDES AND LEASES

## THE NORTH ATLANTIC FISHERIES ARBITRATION

*The Permanent Court of Arbitration at The Hague, 1910*

WHEN, on January 27, 1909, Mr. Root, Secretary of State of the United States, and Mr. Bryce, British Ambassador at Washington, signed a special agreement submitting the North Atlantic Fisheries dispute to arbitration at The Hague, the final step was taken toward the settlement of the most persistent controversy in the history of American diplomacy. It was just the kind of question contemplated in the General Arbitration Treaty of April 4, 1908, which undertook to refer to arbitration "differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy;" and it was in conformity with this treaty that the agreement was made, inasmuch as the issue submitted called for the interpretation of the first article of the Convention of 1818, by which the two parties had sought to define the rights of American fishermen in British North American waters.

In 1782-83, when Great Britain and her former colonies came together in negotiations for peace, one of the subjects upon which agreement was found most difficult was the nature and the extent of the fishing rights in the North Atlantic. Previous to the Revolution, the colonists had resorted to the fishing grounds on equal terms with their fellow-subjects in the mother country. They had assisted in acquiring them during the colonial wars and had found in them one of their chief sources of wealth, relatively much more important at that time than to-day. But these national and economic interests of the United States collided with the British claim to sovereign control, and hence, when the negotiators addressed themselves to the disposal of the fisheries, two opposite theories were advanced. The Americans, especially John Adams, maintained that what was taking place was a "division of empire" and that the colonies,

on withdrawal, still retained all their former rights, among them the free use and enjoyment of the fisheries. "The treaty was nothing more than mutual acknowledgment of antecedent right." The British, on the other hand, considered the fisheries an acquisition by the British Crown for the use of British subjects and always at the disposal of Great Britain, and maintained that the Americans, having lost the rights as well as the status of British subjects, could get back former fishing privileges only by way of grant from Great Britain. After several proposals on each side, agreement was reached in article 3 of the treaty of peace, as follows:

"It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island); and also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

Two kinds of fishery were the subject of this article — the offshore and deep-sea fishery, which is designated as a *right* to be *continued* in enjoyment, and the inshore fishery, participation in which was said to be a *liberty*. The reservation, "such part of the coast of Newfoundland as British fishermen shall use," had in mind the restriction already placed on the western and northern coasts of that island by the fishing rights possessed by the French under the Treaties of Utrecht and Paris. The other liberty obtained — that of drying and curing fish — was limited in scope

and of uncertain tenure, because conditional upon the non-settlement of the coast.

The fishery agreement of 1783 proved satisfactory and remained unchallenged, until the War of 1812 disclosed a fundamental difference of view as to the effect of the war The Controversy—1812-18 upon the Treaty of 1783, especially upon its third article. Great Britain contended that the "liberties" obtained under that treaty, being in the nature of commercial concessions, had been abrogated by the event of war and could be recovered only for a consideration. The United States contended that the treaty of peace had been, from its nature, a permanent settlement, not to be affected by future wars, and that any fishing privileges specified were preëxisting rights automatically remaining with the Americans on the "division of empire," the permanency of which rights was no more open to challenge than the recognition of independence or the establishment of the boundaries. No agreement, however, could be reached by the negotiators of the Treaty of Ghent, and the subject of the fisheries was left in abeyance. Thus, for a time, the status of American fishermen in British colonial waters remained undefined.

Such a condition, however, produced friction, and seizures of American fishing vessels began to be made within British waters, though no claim was made by Great Britain to exercise jurisdiction over fishing on the high seas. A warning given to an American vessel by a British warship to desist from fishing within sixty miles of the coast of Nova Scotia, when made the subject of protest by the United States, brought forth the declaration from the British Government that "as, on the one hand, Great Britain could not permit the vessels of the United States to fish within the creeks and close upon the shores of the British territories, so, on the other hand, it was by no means her intention to interrupt them in fishing anywhere in the open sea, or without the territorial jurisdiction, a marine league from the shore; and, therefore, that the warning given at the place stated, in the case referred to, was altogether unauthorized."

This intention of Great Britain to exclude American fishing vessels from the territorial waters met with continuous protest from the United States and a considerable correspondence passed

in 1815-16 between John Quincy Adams, then Minister of the United States at London, and Lord Bathurst, on the part of the British Government. The positions taken in the negotiations at Ghent were maintained. Lord Bathurst argued that, while some of the provisions of the Treaty of 1783 might, from their nature, be irrevocable, the language of the article dealing with the fisheries showed that it was not intended to survive a war between the parties. The words "right" and "liberty" were contrasted, the former, throughout the treaty, being used "as applicable to what the United States were to enjoy in virtue of a recognized independence," the latter, "to what they were to enjoy as concessions strictly dependent on the treaty itself." "The grant of this liberty," wrote Lord Bathurst, "has all the aspect of a policy temporary and experimental, depending on the use that might be made of it." Mr. Adams, on the other hand, stoutly reiterated his former argument that the treaty had survived the war and with it the fishing liberties. He understood the term "liberty" to be "essentially as permanent as that of 'right' . . . and a modification of the same thing." The liberties had never been renounced by the United States and hence were as much in its possession as ever. In Mr. Adams's opinion, "the participation in the liberties of which their right is now maintained is far more important to the interests of the people of the United States than the exclusive enjoyment of them can be to the interests of Great Britain," and he expressed the belief that the smuggling on the part of American fishing vessels and their obstruction of British fishermen, both objects of complaint by Great Britain, could be "obviated by arrangements duly concerted between the two governments."

After two or three years of unsuccessful negotiations, commissioners from both sides at last met in London in 1818 to draw up

The Conven-  
tion of 1818 a new commercial convention in place of the one which was to expire in 1819. At the same time they were empowered to make a settlement of the fishery dispute and other questions arising out of the late war. The result was the convention, signed October 20, 1818, respecting fisheries, boundaries, and the restoration of slaves, the first article of which is as follows:



"Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks from Mount Joly on the southern coast of Labrador, to and through the Straits of Belleisle and thence northwardly indefinitely along the coast, without prejudice however, to any of the exclusive rights of the Hudson Bay Company: and that the American fishermen shall also have liberty forever, to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above-mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, or purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

An analysis of the terms of this article and a comparison with the corresponding article in 1783 show that —

1. Nothing was said in 1818 of the "right" to the deep-sea fishery, admitted in 1783. As no controversy had arisen over its permanence, it remained with the United States.
2. In 1783, the "liberty" to take fish, granted to the inhabitants of the United States, was to be exercised in all British territorial waters except those of Newfoundland, where it was restricted to "such part of the coast as British fishermen shall use;" in 1818, this liberty was limited to four specified coasts, one of them the "French shore," so called.
3. The liberty of 1818 was to be enjoyed "forever," which word was insisted upon by the American Commissioners.
4. The words, "in common with the subjects of His Britannic Majesty," were inserted in 1818 at the instance of the British Commissioners, it being understood at the time by the American Commissioners that they were intended to prevent exclusion of British fishermen from these treaty coasts. Later, Great Britain interpreted the words to imply subjection to regulation in common with British fishermen.
5. The liberty to dry and cure fish was continued "forever" in 1818, but with changes in locality.
6. As consideration, the United States "renounced forever" all other liberties possessed under the Treaty of 1783, the inference being that something had continued from 1783 and was perpetual save for the renunciation.
7. This renunciation was to be effective "within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above mentioned limits."
8. Entry, however, was permitted in the renounced waters for four specified purposes and for no other.
9. Such entry was subject to the restrictions necessary to confine it to the purposes of the convention.

The Convention of 1818 put an end for a time to all questions of treaty interpretation. Great Britain supplemented the convention with appropriate governmental action by the act of June 14, 1819, empowering the Crown, by regulations and instructions to colonial fishery officers, to give

effect to the purpose of the convention, and by the orders in council which issued in accordance with the act. Some seizures continued to be made, but they became questions of fact, not of debatable right. Nothing happened to challenge the fisheries settlement until the passage in 1836 of the Nova Scotia Hovering Act by which it was sought to prevent infraction of the revenue laws on the part of American fishing vessels by making it an offense punishable by confiscation for them to hover under suspicious circumstances within three miles of the Nova Scotia coast. This act was adopted by the British Government "as the rules, regulations, and restrictions respecting the fisheries on the coasts, bays, creeks, and harbors of the province of Nova Scotia." Some seizures were made under the Hovering Act, but all for offenses committed within the ordinary territorial jurisdiction of three miles from the shore. In 1839, however, the authorities of Nova Scotia began to put a new interpretation upon the renunciation clause in so far as it applied to "bays." The term, they maintained, was geographical and included all bays, whatever their extent, and corollary to this was advanced the "headland theory," under which the jurisdictional limit of three miles was to be measured by a line drawn from headland to headland along the coast. The privileges of entry under the treaty were also scrutinized and made difficult of enjoyment. At about the same time attempt was made to compel American fishing vessels to pay light dues on their passage through the Strait of Canso, which was claimed by the United States as part of the high seas and not at all within the scope of the renunciation clause of the Convention of 1818. Fresh seizures were made in accordance with these new interpretations, notably that of the *Washington* in the Bay of Fundy and that of the *Argus* off the coast of Cape Breton, in each case far beyond three miles from shore. Both seizures were protested by the United States, and under the claims of the Convention of 1853 favorable awards were obtained.

In 1854 all disputes over fishing rights were for a time terminated by the Reciprocity Treaty negotiated among other reasons "to avoid further misunderstanding . . . in regard to the extent of the right of fishing on the coasts of British North America." Under this treaty the American fishing liberties of 1818 were

extended so as to operate in all coast waters of the provinces (with the exception of Newfoundland whose participation in the treaty was to be upon conditions) in return for similar liberties accorded British fishermen in the waters of the United States north of the thirty-sixth parallel of north latitude. This reciprocal agreement remained in force until 1866, being terminated in that year by notice from the United States, given in accordance with the fifth article of the treaty. Thereupon, the status of fishing rights reverted back to the Convention of 1818. To avoid temporarily a revival of the former controversies, American fishermen were allowed to enjoy the privileges they had had under the Reciprocity Treaty on payment of special licenses, but in 1870 this system was discontinued.

In 1867 the provinces of Canada, New Brunswick, and Nova Scotia confederated and after that time jurisdiction over their fisheries was vested in the Dominion Government. Newfoundland remained outside the Confederation, as she still does, and her legislation is always to be considered apart from that of Canada. The remaining maritime province, Prince Edward Island, entered the Dominion in 1873. One of the diplomatic difficulties throughout the whole controversy, and especially in its later years, has been the virtual independence of Canada and Newfoundland with respect to fishery legislation, coupled with the international responsibility of Great Britain for the same. In 1868 and 1870 legislation was enacted by the Dominion Parliament "respecting fishing by foreign vessels" which was more severe in its application than the Nova Scotia Hovering Act of 1836. In particular several seizures were made for the offense of purchasing bait within Canadian waters, held by the Canadian courts to be "a preparing to fish" within the meaning of the acts. The Government of the United States was contemplating retaliatory measures, — among them the suspension of the bonding privilege extended to Canadian goods when in transit through the United States, — but before any such action became necessary a joint high commission met in Washington in 1871 to settle outstanding differences between the two nations. The result of their negotiations was the Treaty of Washington, which, in so far as it dealt with the fisheries, virtually revived the reciprocal

arrangements of 1854 save that the limit for British fishing in American waters was now 39° north latitude. The fishery provisions of the Treaty of Washington went into effect in 1873 (in Newfoundland in 1874) and expired, again by notice from the United States, in 1885, after which date the Convention of 1818 for the third time became the measure of American fishing rights.

As Great Britain contended that the United States was receiving the more valuable consideration, it was provided in the Treaty of Washington that a commission should determine the difference in value, if any, between the two reciprocal concessions and award a corresponding amount to Great Britain in compensation. This commission met in Halifax in 1877 and awarded to Great Britain \$5,500,000, which sum was duly paid by the United States.

The agreement of 1871, however, failed to remove the sources of friction. Local regulations, especially in Newfoundland, were disregarded by American fishermen as contravening treaty rights, and the attempt to enforce them led to occasional collisions. The most serious of these occurred at Fortune Bay in Newfoundland on January 6, 1878, when American fishermen were attacked by the inhabitants and forcibly prevented from taking fish, the reason assigned being the infringement of Newfoundland laws preventing Sunday fishing as well as the use of seines at that season of the year. This raised in a direct manner the question as to whether fishing liberties held "in common with the subjects of Her Britannic Majesty" could be restricted in their exercise by colonial or British regulation. The treaty involved in this case was that of 1871 under which all coast waters were open to Americans, but the same question was later at issue within the limits of the treaty coast on the revival in 1885 of the Convention of 1818. The Fortune Bay incident was settled in 1881 by the payment by Great Britain of £15,000 by way of damages, but "without prejudice to any question of the rights of either of the two governments" under the Treaty of 1871. The incident, however, implying as it did the claim of Newfoundland to legislate for American fishermen, together with the dissatisfaction of the United States over the award of the Halifax Commission, was responsible for the failure to renew the Treaty of Washington.

On the termination of the Treaty of Washington, the Canadian Government revived its fishing regulations and gave instructions that they be strictly enforced. With respect to foreign fishermen, the fishery officers were "to see that they obey the laws of the country, that they do not molest British fishermen in the pursuit of their calling, and that they observe the regulation of the fishing laws in every respect;" and they were also "to prevent foreign fishing vessels and boats which enter bays and harbors for the four legal purposes . . . from taking advantage thereof to take, dry, or cure fish therein, to purchase bait, ice, or supplies, or to trans-ship cargoes or from transacting any business in connection with their fishing operations." In accordance with these restrictions, seizures began again to occur, at which vigorous diplomatic protest was made by the United States, followed up in 1887 by the passage of a retaliatory act to be enforced at the discretion of the President. But the same year proposals were made for a new treaty and negotiations were held at Washington by joint commissioners, who, on February 15, 1888, signed a new agreement on the fisheries, which, however, failed to secure the consent of the Senate of the United States. Pending ratification of the treaty the commissioners agreed to a *modus vivendi*, which temporarily removed all difficulties and which, despite the failure of the treaty, was continued in force by Canada down to 1910. Newfoundland obviated further disputes by a system of licenses permitting the purchase of bait and supplies and the shipment of crews for foreign vessels.

In 1892 an effort was made to improve relations between the United States and Newfoundland by the so-called Blaine-Bond Treaty, which Great Britain failed to ratify because of Canadian opposition. In 1902 another treaty was negotiated, the Hay-Bond Convention, but it, too, failed of ratification, this time in the Senate of the United States. By way of retaliation, Newfoundland, after 1905, began to refuse American fishermen licenses and to enact legislation calculated to make the exercise of American fishing rights as difficult as possible. Regulations as to the days, hours, and manner of fishing were enforced, Newfoundlanders were forbidden to be employed on foreign vessels in treaty waters, and entry and clearance at custom-houses were required of

American fishing vessels, as well as payment of light and harbor dues. These measures drew immediate protest from the Government of the United States and in consequence the whole question of American fishing rights under the Convention of 1818 was reopened. The positions taken were found to be irreconcilable through diplomacy, but, on the suggestion of the United States, it was decided to have recourse to arbitration, with the result that after much time and care a form of submission was agreed upon. Meanwhile, a *modus vivendi*, renewed annually, prevented further trouble in Newfoundland waters.

Under the special agreement to arbitrate, the tribunal was to be chosen from the Permanent Court of Arbitration at The Hague and its procedure was substantially that laid down The Arbitration of 1910 in the Convention for the Pacific Settlement of International Disputes of 1907. Should any question be raised as to the reasonableness of any regulation, the tribunal might refer such question to a commission of experts. At the same time it was empowered to recommend rules and a method of procedure for the determination of any questions arising in the future as to the exercise of the fishing liberties.

The personnel of the tribunal was chosen by direct agreement, as follows: Dr. Lammasch, of Austria, who presided; Dr. A. F. de Savornin Lohman, of the Netherlands; Dr. Drago, of the Argentine Republic; Judge Gray, of the United States Circuit Court of Appeals; and Sir Charles Fitzpatrick, Chief Justice of Canada. Each party was represented by an agent, Great Britain by the Honorable A. B. Aylesworth, the United States by the Honorable Chandler P. Anderson. There was a large array of counsel on each side, chief among whom were Senator Root for the United States and Sir Robert Finlay for Great Britain. The tribunal convened on July 1, 1910, and held forty-one sessions, rendering its award on September 7, 1910.

As has been already indicated, the arbitral submission called for the interpretation of article 1 of the Convention of 1818. The scope of arbitration was slightly narrowed by an agreement, in an exchange of notes, to omit any question as to the Bay of Fundy or the right of innocent passage through the Gut of Canso, there being in the present arbitration no prejudice to the respec-

tive contentions on either side. But apart from this, all the controversy of the century was summed up in a series of seven questions submitted to the tribunal for decision. For the sake of convenience each question, with that part of the award bearing upon it, will be discussed separately.

Question One      "To what extent are the following contentions or either of them justified?

"It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland, in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance —

- "(a) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said article 1 the inhabitants of the United States have therein in common with British subjects;
- "(b) Desirable on grounds of public order and morals;
- "(c) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty, and not so framed as to give unfairly an advantage to the former over the latter class.

"It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts; or (2) the method, means, and implements used by them in taking fish or in carrying on fishing opera-



tions on such coasts; or (3) any other limitations or restraints of similar character —

- “(a) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and
- “(b) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and
- “(c) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.”

It will be noticed that in the submission of this question both parties are in substantial accord as to the necessity of regulations and as to the nature of them: they must in all cases be “reasonable.” The main contention is over what is “reasonable regulation.” “Reasonableness” as a standard is liable to vary. Who shall be the judge? Shall Great Britain alone, in virtue of her territorial sovereignty, determine what is reasonable for them or shall such reasonableness be a matter for “common accord”? “The two parties,” said Mr. Root, “approach the subject of the first question from different points of view. . . . Great Britain states the question as a question relating to the exercise of her sovereign rights. The United States states the question as relating to the inviolability of her grant of right.” The essential point to establish, the United States maintained, was just what power to regulate remained with Great Britain after she had given up exclusive sovereignty by the “grant” to the United States of an equal right in the fishery.

This contention that Great Britain had limited her sovereignty was equivalent to asserting that she had instituted a servitude for the benefit of the United States and it necessitated an exhaustive examination of the history and the significance of the doctrine of international servitudes, especially in its bearing upon the concept of the sovereignty of states. The doctrine, it was argued, was well established in modern international law, having passed by

analogy from Roman law and having been continually confirmed by international practice. The essentials of a servitude were, that it was created by one state, the servient state, for the benefit of another state, the dominant state; that its permanency was beyond the control of the state creating it; and that it made the territory of the one state serve the interest of the other. All three essentials were present in the treaty right of 1818: (1) it could be enjoyed only through the "inhabitants," that is, the "people" of the United States, being thus in effect a grant to "the United States," for in a republic sovereignty resides in the body of the people; (2) the right was to be in perpetuity — in 1818 the word "forever" was inserted; and (3) it made certain specified coasts serve the economic interest of the United States. Unless otherwise stated, the concurrent exercise of a servitude was presumed (concurrent, that is, with the servient state's enjoyment of the subject-matter of the servitude), but a servitude limited the power of the state granting it to the extent that the full exercise of sovereign power was inconsistent with the full enjoyment of the servitude. The United States did not contend that the sovereignty of Great Britain over the treaty coasts was limited for the general purposes of jurisdiction, but she did contend that, in the matter of the common fishery rights, there had been a transfer of sovereignty to the extent required for the fulfillment of the treaty, or, if not an actual transfer, an implied undertaking not to exercise sovereignty where, by so exercising it, the enjoyment of the liberty might be impaired. To quote Mr. Root's argument, "one of the essential qualities of this grant . . . is that it is removed from the exercise of the powers of sovereignty of Great Britain . . . and is vested alone in the sovereign to which the grant was made. The sovereignty to which the grant was made . . . arrogating to itself the right to control its own inhabitants, to condition the right to them, is exercising that which is the right of the sovereign to which it is granted and not the right of the sovereign making the grant. . . . When the grant limited British sovereignty, it excluded British sovereignty from the field of operation commensurate with the right granted according to its terms."

The force of this argument depended upon the meaning attached

to the terms "liberty" and "in common." The United States held "liberty" in the treaty to be synonymous with "right," citing its common-law meaning of "franchise," especially that peculiar form of franchise known as "incorporeal hereditament," such as grants of forest, park, and fishery. It was natural for both common-law countries to attach the same meaning to the word. The "French shore" fishery was a "right," yet the word "liberty" had been used to describe it in the Treaty of 1763. Later, in the reciprocity agreements of 1854 and 1871, the two words were treated as synonymous. The intent of the negotiators in 1783 was to establish a "right," though they had used the word "liberty," and the word had been continued in 1818. According to John Adams "liberty" in the treaty of peace was substituted for "right" at the request of the British negotiators who thought the word "right" would be unpleasant to British ears. The expression "in common" was likewise used in a technical sense well known to both parties, conforming thus to an accepted canon of treaty construction. In 1818 it would be understood to denote "a common and equal right as opposed to a several or exclusive right;" hence the "liberty" of the treaty was "to be enjoyed by neither to the exclusion of the other." While this argued against exclusive regulation by Great Britain it did not imply lack of regulation, for joint administration of property rights by nations was feasible and in this case was demanded by self-interest, and it had good precedent in the joint regulation of the "French shore" fishery by Great Britain and France. The words "in common," it was suggested, were inserted by Great Britain to save herself from future trouble over French rights in the same localities, as well as to prevent any exclusion of British by American fishermen, of which complaint had been made by Lord Bathurst before the Convention of 1818 had been negotiated. Because American fishermen had the "liberty in common" with British fishermen and because Great Britain could regulate the exercise of the fishing rights of the latter, it did not follow that she could extend her power to regulate to the "liberty" of the former; "it is a *right* that the inhabitants of the United States are to have in common; it is not that it is to be *exercised* in common with British subjects." If the fishing "liberty" were analogous to trading privi-

leges and if Great Britain had intended to retain the power to regulate, there would have been express mention of it in the treaty, as there had been in all the commercial treaties negotiated up to that time between the two countries. The provisions in the French treaties were very similar to the treaty with the United States in 1783; Great Britain had never attempted to regulate the French fishery; hence there was no reason why she should regulate the American. That Great Britain might promise reasonable regulation removed no difficulties, for the power to make reasonable regulation was tantamount to regulation at will as long as the regulating state was the judge of the reasonableness. Great Britain and her colonies had no superior economic or moral insight; on the contrary, colonial legislatures had regulated unreasonably in that they had discriminated in favor of local fishermen.

In a word, a servitude had been created, no right to regulate had been reserved to Great Britain and, failing such, nothing affecting American fishing rights could be done without the consent of the United States.

In joining issue on the doctrine of servitudes, Great Britain admitted their existence in international law, but held it dangerous to press too closely their analogy with private law. No servitude, however, had been created in 1818, for the essence of a servitude is territory, servient and dominant, whereas under the treaty the grant was one to be personally enjoyed by the "inhabitants of the United States." No sovereign rights had been granted, for such rights are fundamental and could be transferred only in express terms, leaving no doubt of intention. Sovereignty was always considered to remain unless explicitly abrogated; it was personal and unitary and could not, on the modern view of it, be partitioned. The right to legislate was implied in sovereignty, and as the Treaty of 1818 did not touch sovereignty, it left this right solely with Great Britain. A fishing "liberty" — which, in the British argument, meant a "permission" — when granted was always given subject to regulation by the sovereign grantor, unless an exception was made explicitly in the grant. In 1818 the right of regulation was merged in the subject-matter of the treaty; the United States partook of the subject-matter and

therefore came under regulation "in common with subjects of His Britannic Majesty," implying that, as the fishery was a regulated one for British fishermen, it was equally so for fishermen of the United States. Jurisdiction over fishing rights could not be conferred upon the United States without involving jurisdiction on land, with the result that the United States would be exercising jurisdiction on British territory, a situation to which Great Britain could not give assent. The history of Anglo-American treaty relations did not support either exemption from, or participation in, the right to regulate. Exemption might lead to anarchy on the fishing ground. Participation, by requiring its concurrence, would in effect give the United States the exclusive decision as to what was reasonable regulation, a situation inconsistent with the legislative independence of Great Britain and her colonies.

In its award on Question One the tribunal gave its decision against the claim of the United States to a servitude in the fisheries. The doctrine of international servitudes, it was pointed out, was unfamiliar to American and British publicists in 1818. It was not consistent with modern political theory "owing to the constitution of a modern state requiring essential sovereignty and independence," but had been developed in the peculiar relations, now obsolete, of the Holy Roman Empire. Because of this lack of adaptation, especially to the principles of constitutional governments, "it could, therefore, in the general interest of the community of nations and of the parties to this treaty be affirmed by this tribunal only on the express evidence of an international contract." Apart from these considerations, "by the Treaty of 1818 one state grants a liberty to fish, which is not a sovereign right but a purely economic right, to the inhabitants of another state," there being no analogy of dominant and servient territory. The fishery to which admission was given was a regulated one in 1818, and the words "in common with British subjects" implied that the inhabitants of the United States came under a common regulation. The contention that these words were intended merely to negative exclusion of British fishermen was not supported "by the historical basis of the American fishing liberty," for the same words in the same connection occurred in

1854 and 1871, when no such interpretation could possibly be put upon them.

The tribunal also found itself unable to accept the alternative contention of the United States that the sovereign jurisdiction of Great Britain was limited to reasonable regulation, of the reasonableness of which the United States must approve. "Every state," it said, "has to execute the obligations incurred by treaty *bona fide* and is urged thereto by the ordinary sanctions of international law." The right of a state to regulate admission of foreigners to its territory was everywhere admitted and no exception in this respect could be found in the Convention of 1818. Great Britain, as the local sovereign, was "not only entitled but obliged to provide for the protection and preservation of the fisheries;" but that the United States should exercise a right of consent "would predicate an abandonment of its independence in this respect by Great Britain." The rights of legislation were not mentioned in the treaty, the provisions of which referred only to a liberty to fish in common and "a line which would limit the exercise of sovereignty of a state within the limits of its own territory can be drawn only on the ground of express stipulation and not by implication from stipulations concerning a different subject-matter." The claim of the United States, if conceded, would amount to a participation in the domestic legislation of Great Britain and her colonies "and to that extent would reduce those countries to a state of dependence."

In accordance with the reasons given, the tribunal decided and awarded as follows:

"The right of Great Britain to make regulations without the consent of the United States as to the exercise of the liberty to take fish, referred to in article 1 of the Treaty of October 20, 1818, in the form of municipal laws, ordinances, or rules of Great Britain, Canada, or Newfoundland is inherent to the sovereign of Great Britain.

"The exercise of that right by Great Britain is, however, limited by the said treaty in respect to the said liberties therein granted to the inhabitants of the United States in that such regulations must be made *bona fide* and must not be in violation of said treaty."

Inasmuch, however, as there was agreement on both sides that Great Britain should not be the sole judge of reasonableness of fishing regulations, the tribunal further decided that "the reasonableness of such regulation, if contested, must be decided not by either of the parties but by an impartial authority," and it made use of the power given it under the special agreement to institute a commission of three expert specialists to pass upon any existing regulations requiring examination, the third member of the commission being a non-national. For questions arising in future, the tribunal recommended, as authorized, rules and a method of procedure, the essential feature of which was to be the establishment of permanent mixed fishery commissions for Canada and Newfoundland respectively. These commissions, similar in composition to the one designated by the tribunal, were to be the arbitral bodies whose decisions in the countries that contested the regulations were to be accepted as final. That part of the special agreement under which the commissions were instituted was decided by the tribunal to be "permanent in its effect and not terminable by the expiration of the General Arbitration Treaty of 1908 between Great Britain and the United States."

The submission of the second question was as Question Two  
follows:

"Have the inhabitants of the United States, while exercising the liberties referred to in the said article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?"

This question had in view primarily the legislation of Newfoundland forbidding its citizens to engage as members of crews of American fishing vessels. The United States maintained that the fishing liberty was in the vessels, as fishing vessels, and that the composition of their crews was governed by the ordinary rules of master and servant. Those receiving the liberty — the inhabitants of the United States — could use all customary means for exercising it, including the engaging of crews, the nationality of whom was under no restriction in the treaty. It was not merely the manual act of catching fish that constituted the liberty, but also the more important enterprise of owning and operating the vessels. On the contrary, Great Britain relied on the explicit

words of the treaty — “inhabitants.” Vessels, as vessels, had no rights. The effect of the contention of the United States would be, in theory, to throw the fisheries open to the world and to put no limit to fishing operations because of the great capital the United States could invest under these conditions. Further, it was not inconsistent with the treaty for Great Britain or her colonies to regulate the employment both of subjects and aliens within their jurisdiction, for otherwise the treaty would be affecting a sovereign right.

The tribunal answered this question in the affirmative, mainly on the ground that the fishing liberty was an economic right which included the right to employ servants without any treaty limitation as to nationality. Hence the award:

“Now, therefore, in view of the preceding considerations, this tribunal is of opinion that the inhabitants of the United States while exercising the liberties referred to in the said article have a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States. But in view of the preceding considerations the tribunal, to prevent any misunderstanding as to the effect of its award, expresses the opinion that non-inhabitants employed as members of the fishing crews of United States vessels derive no benefit or immunity from the treaty and it is so decided and awarded.”

**Questions** These two questions relating to a specific point  
**Three and Four** of regulation were formulated in similar terms.  
Question Three was as follows:

“Can the exercise by the inhabitants of the United States of the liberties referred to in the said article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses or the payment of light or harbor or other dues, or to any other similar requirement or condition or exaction?”

The United States argued that fishing vessels, when not engaged in commercial pursuits, should not be subjected to what are purely commercial requirements, for such was not the intent of the treaty. Great Britain met this argument with the contention that such charges were normal and that thus it was incumbent upon the United States to prove special exemption. Fishing



vessels were often disposed to contravene the revenue laws and the only effectual means of prevention was to require entry and report. This latter argument was felt by the tribunal to be not unreasonable, whenever entry or report was feasible, but on the question as such the decision was in favor of the United States, as follows:

"The requirement that an American fishing vessel should report, if proper conveniences for doing so are at hand, is not unreasonable for the reasons stated in the foregoing opinion. There should be no such requirement, however, unless there be reasonably convenient opportunity afforded to report in person or by delegation either at a custom-house or to a customs official. But the exercise of the fishing liberty by the inhabitants of the United States should not be subject to the purely commercial formalities of report, entry, and clearance at a custom-house nor to light, harbor, or other dues not imposed upon Newfoundland fishermen."

Question Four dealt with the restrictions under the renunciatory clause of the treaty:

"Under the provision of the said article that the American fishermen shall be admitted to enter certain bays, or harbors for shelter, repairs, wood, or water and for no other purposes whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbor or other dues or entering or reporting at custom-houses, or any similar conditions?"

The tribunal held that as these privileges were granted upon grounds of humanity and hospitality, it would be inconsistent with their free exercise to impose conditions, but it seemed reasonable that report should be made, if convenient, in case there was intention to remain longer than forty-eight hours.

"From where must be measured the 'three marine miles of any of the coasts, bays, creeks, or harbors' referred to in the said article?"

Question Five

From the point of view of international law this question came next in importance to Question One. It related, in effect, to the

meaning of the word "bays" as it occurs in the renunciatory clause of the treaty and was bound up with the thorough discussion of marine jurisdiction. Great Britain held that the term as used in 1818 was *geographical* and inclusive of all bays of whatever size; the United States held that it was to be read along with its context, "coasts . . . creeks or harbors of His Britannic Majesty's dominions," as meaning *territorial* bays, that is, those smaller bays so related to the land as to be within British territorial jurisdiction and suitable for the four purposes specified. According to the British contention the "three marine miles" should be measured in the case of bays from a line drawn from headland to headland; according to the American contention the line called for should follow the sinuosities of the coast. The United States argued that a state, if it wishes to extend its jurisdiction beyond the customary jurisdictional zone, must assert its right to do so and secure the acquiescence of other states in its assertion. Great Britain had never claimed such jurisdiction over the bays in question before 1818. The treaty with France in 1839 and the North Sea Fisheries Convention showed that Great Britain had not exercised general jurisdiction over her bays, for in those cases conventional lines of jurisdiction had been agreed upon. In the negotiations prior to the unratified treaty of 1806, the United States had proposed to Great Britain an extension of marine jurisdiction so as to include waters between headlands, and this proposal was repeated in 1818, but on both occasions Great Britain had refused assent. The inference was that Great Britain was estopped by her refusal from claiming any such rights later. In the diplomatic correspondence leading up to the Convention of 1818, the expressions used by British statesmen imported that the subject-matter of the controversy was the exclusion of American fishermen from waters within territorial jurisdiction. This limit, in 1818, was well established in international law as a marine league and it still remained so. Outside of that limit there had been no renunciation, for every independent state had a natural right to fish on the high seas. The intention of the American negotiators was clear on the point: "In signing it," one of them, Mr. Rush, wrote afterwards, "we believed that we retained the right of fishing in the sea, whether called a bay,

gulf, or by whatever term designated, that washed any part of the coast of the British North American Provinces, with the single exception that we did not come within a 'marine league of the shore.'" The seizures made under the "headland theory" (*supra*, p. 183) had not been sustained when referred to arbitration, nor had Great Britain been able to establish her position in the case of the Bay of Fundy.

In her arguments in reply, Great Britain differentiated throughout between the open, unenclosed waters off the coast, and those in "bays" or "chambers between headlands." It was only to the former that the three-mile rule applied; the latter were controlled by other considerations, such as configuration, relation to land and naval defenses, the necessities of commerce, or the assumption of jurisdiction in the interests of the domestic order of the state. For some or all of these reasons the United States had extended its jurisdiction over several large bays on its coast-line, notably Chesapeake Bay and Delaware Bay, and this extension had been recognized by Great Britain and other states. Similarly, the British jurisdiction over Conception Bay in Newfoundland, assumed to exist in a case before the Privy Council, had been acquiesced in by the United States. In the Strait of Fuca, when the Pacific boundary was delimited, the line of jurisdiction was run out far beyond three miles. The Bay of Fundy did not invalidate the British contention; it had been given up in that case on grounds of favor, not of law. Besides, the headlands in the Bay of Fundy were not both in British territory, hence the "headland theory" could not be applied. The British contention was for a historical construction, not a technical. Far from there being an established limit in 1818, both the United States and Great Britain were at that time urging wide extensions of jurisdiction. But whatever may have been the limit, the negotiators used the word "bays" in the general meaning of that word as required by the sense of the treaty. All maps in 1818 had these bays indicated. There was no qualification in the treaty and hence it ought to be interpreted as it read and as it was interpreted by the United States herself, when she called upon Great Britain in 1823 to guarantee her liberty under the treaty as against the French attempts to molest American fishermen in bays beyond the three-mile

limit, "clearly within the jurisdiction and sovereignty of Great Britain."

In its award on this Question, the tribunal accepted the arguments of Great Britain. The term "bays" in its opinion applied to "every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing." The geographical character of a bay was held to be of vital importance to the interests of the territorial sovereign, "but as no principle of international law recognized any specific relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this tribunal is unable to qualify, by the application of any new principle, its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule." The opinions of jurists did not point to its unanimous application to bays, nor had it been shown that its application "was present to the minds of the negotiators in 1818 and they could not reasonably have been expected either to presume it or to provide against its presumption." In the geographical sense, as accepted by the tribunal, "a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically but difficult to describe generally."

For these reasons the tribunal decided and awarded as follows:

"In case of bays the three marine miles are to be measured from a straight line drawn across a body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast."

But to make the award more practicable without claiming to constitute thereby a principle of international law, the tribunal proceeded to recommend to the parties, and to apply by virtue of its powers under the special agreement, the ten-mile rule already applied by certain fishery treaties, among them the North Sea Convention and the treaties between France and Great Britain in 1839 and 1867. The rule was enunciated as follows:

"In every bay, not hereinafter specifically provided for, the

limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles."

For the bays specifically provided for, a series of arbitrary lines was drawn which followed in general those laid down in the unratified treaty of 1888.

The award on this Question was not unanimous, Dr. Drago having filed a dissenting opinion, though signing the award as a whole. He maintained that the treaties and the practice of Great Britain and other states had established a principle for territorial waters — the three-mile marginal belt, together with "the ten-mile entrance rule or the six miles, according to occasion," the extension being given strictly for the convenience of the fisheries and having "its root and connection with the marginal belt of three miles." Apart, however, from the interpretation it had given to the treaty, the decision of the tribunal in his opinion was not a satisfactory solution, for "no rule is laid out or general principle evolved for the parties to know what the nature of such configuration is or by what methods the points should be ascertained from which the bay should lose all the characteristics of such."

"Have the inhabitants of the United States the liberty under the said article or otherwise to take fish in the bays, harbors, and creeks on that part of the southern coast of New-  
foundland which extends from Cape Ray to Rameau Question Six  
Islands or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?"

This question was one of purely verbal interpretation and related to a construction of the treaty put forward by the Government of Newfoundland for the first time in 1905. It was based on the omission of the words "bays, harbors, and creeks" in specifying the fishing liberties on the "coast" of Newfoundland and on the "shores" of the Magdalen Islands, and if adopted, would have deprived American fishermen of the valuable herring fishery on the west coast of Newfoundland. The award on this Question held that "American inhabitants are entitled to fish in the bays, creeks, and harbors of the treaty coasts of Newfoundland and the Magdalen Islands."

"Are the inhabitants of the United States, whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in article 1 of the Treaty of 1818, entitled to have for these vessels, when duly authorized by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to the United States trading vessels generally?"

Question  
Seven

When the American fishing liberties were secured in 1818, colonial trade was closed to foreign vessels and hence the exercise of American trading privileges was not contemplated in the treaty. In 1830, however, the latter were acquired by reciprocal agreement with Great Britain without any reservation in the case of fishing vessels. Hence the question arose whether American vessels could both trade and fish concurrently on the treaty coasts. Great Britain maintained that they could not, basing her position on a strict interpretation of intention in 1818. Besides, the failure to maintain the distinction between fishing and trading vessels would conduce to smuggling. The United States claimed the double privilege on the ground that there was nothing in the Treaty of 1818 to prevent the exercise of rights acquired later. The right to trade was not the subject-matter in 1818 nor was the right to fish burdened with any restriction in 1830, but both rights, once obtained, were to be exercised in the discretion of the United States.

This Question also was answered in favor of the United States, the tribunal being of opinion that "the inhabitants of the United States are so entitled in so far as concerns this treaty, there being nothing in its provisions to disentitle them, provided the treaty liberty of fishing and the commercial privileges are not exercised concurrently."

(*Proceedings*, 12 vols., published by the Government Printing Office, Washington; *American Journal of International Law* [1911], vol. v, pp. 1-31; [1913], vol. vii, pp. 1-16; Moore: *Digest of International Law*, vol. 1, pp. 767-874; G. G. Wilson, *The Hague Arbitration Cases*.)

## LEASED TERRITORY IN CHINA (1898)

As a result of her defeat in 1894, China had to cede to Japan, by the Treaty of Shimonoseki, April 17, 1895, Formosa, the Pescadores, and the southern portion of the Province of Feng-tien (the Liao-tung Peninsula). In addition, an indemnity of 200,000,000 taels was exacted, the Japanese to remain in occupation of Wei-hai-wei until the last installment was paid. The cession of Liao-tung carried with it the possession of Port Arthur, a strategic position dominating the northern approach to Peking. For this reason soon after the conclusion of the treaty, Russia, Germany, and France, considering their vital interests in China endangered, addressed a collective note to Japan, in which they urged the retrocession of Liao-tung to China in order to preserve her territorial integrity. Japan assented to the revision of the terms in return for an increase in indemnity.

On November 1, 1897, two German missionaries were murdered in the Province of Shantung. A few days later German warships appeared at the port of Kiao-chau, and an ultimatum was sent to the commandant requesting him to evacuate the place within forty-eight hours. This was followed by a series of demands presented to the Chinese Government calling for prompt reparation and the payment of an indemnity for the loss of the missionaries' lives. Coupled with these, was a demand for a lease to Germany of Kiao-chau, "as a guarantee of good behavior for the future." China yielded, and on February 8, 1898, the German Foreign Secretary was able to announce in the Reichstag the successful negotiation of the lease, the chief provisions of which, as embodied in the Treaty of March 6, 1898, were as follows:

"Art. 1. His Majesty the Emperor of China, guided by the intention to strengthen the friendly relations between China and Germany, and at the same time to increase the military readiness of the Chinese Empire, engages, while reserving to himself all rights of sovereignty in a zone of 50 kilometres (100 Chinese *li*) surrounding the Bay of Kiao-chau at high water, to permit the free passage of German troops within this zone at any time, as also to abstain from taking any measures, or issuing any ordinances

therein without the previous consent of the German Government, and especially to place no obstacle in the way of any regulation of the water-courses which may prove to be necessary. His Majesty the Emperor of China, at the same time, reserves to himself the right to station troops within that zone, in agreement with the German Government, and to take other military measures.

"Art. 2. With the intention of meeting the legitimate desire of His Majesty the German Emperor, that Germany, like other powers, should hold a place on the Chinese coast for the repair and equipment of her ships, for the storage of materials and provisions for the same, and for other arrangements connected therewith, His Majesty the Emperor of China cedes to Germany on lease, provisionally for ninety-nine years, both sides of the entrance to the Bay of Kiao-chau. Germany engages to construct, at a suitable moment, on the territory thus ceded, fortifications for the protection of the buildings to be constructed there and of the entrance of the harbor.

"Art. 3. In order to avoid the possibility of conflicts, the Imperial Chinese Government will abstain from exercising rights of sovereignty in the ceded territory during the term of the lease, and leaves the exercise of the same to Germany. . . .

"Chinese ships of war and merchant vessels shall enjoy the same privileges in the Bay of Kiao-chau as the ships of other nations on friendly terms with Germany; and the entrance, departure, and sojourn of Chinese ships in the bay shall not be subject to any restrictions other than those which the Imperial German Government, in virtue of the rights of sovereignty over the whole of the water area of the bay transferred to Germany, may at any time find it necessary to impose with regard to the ships of other nations. . . .

"Art. 5. Should Germany at some future time express the wish to return Kiao-chau Bay to China before the expiration of the lease, China engages to refund to Germany the expenditure she has incurred at Kiao-chau, and to cede to Germany a more suitable place.

"Germany engages at no time to sublet the territory leased from China to another power. . . ." (*Parliamentary Papers* [1899,] (59), *China*, No. 1, pp. 69-71.)



The rent payable to China, the Foreign Minister said, was merely nominal, "representing the continuation in theory of the proprietorship of China over the territory ceded."

While negotiations were going on with Germany, it was announced that the Chinese Government had given permission to Russian warships to winter at Port Arthur. The Russian Foreign Minister was careful to explain, on December 26, that this "had absolutely no connection with the occupation of the Bay of Kiaochau by Germany," but that Russia "had been glad to accept the offer of the Chinese Government." Early in March, 1898, however, Russia demanded a lease of Port Arthur and Talien Bay, failing which she would take hostile measures. Again China was forced to alienate her territory, granting, on March 27, 1898, a lease in the following terms:

"Art. 1. In order to provide for Russia a suitable basis on the northern coast of China, and thereby to render her naval position complete and secure, His Majesty the Emperor of China agrees hereby to lease Port Arthur and Talien, together with their adjacent waters, to Russia: *Provided*, that the sovereign rights of the Middle Kingdom shall not be impaired by the transaction. . . .

"Art. 3. The period of the lease shall be twenty-five years from date of signing this convention: *Provided*, that at the conclusion of that period, it may be prolonged by mutual agreement between the contracting parties. . . .

"Art. 4. . . . The troops of the Middle Kingdom shall not be permitted to encamp within the limits of the leased land. . . . In the event of a breach of the law by a Chinese subject he shall be handed over to the nearest Chinese local tribunal for judgment and the infliction of a penalty. . . .

"Art. 5. Beyond the northern boundary of the leased land an uninhabited space shall be left, its limits to be hereafter determined. . . . All affairs within this space shall be under the control of Chinese officials, but Chinese troops may not enter there except after consultation with the Russian authorities.

"Art. 6. The contracting authorities agree to regard Port Arthur as a naval station. It shall be used by Russian and Chinese ships only, and neither the men-of-war nor the merchantmen of any other power shall have access to it. Similarly, in the case

of Talien Bay, one part shall serve as a naval station for the warships of China and Russia, but the rest shall be a commercial port, open for the ingress and egress of the ships of all nations. . . ." (*Foreign Relations of the United States* [1898], p. 184.)

In consequence of these changes in the Chinese balance of power, it became necessary for the other powers interested to make counter-moves. Accordingly, on March 25, 1898, Lord Salisbury, the British Foreign Secretary, instructed the British Minister at Peking that it was "necessary to obtain, in the manner you think most efficacious and speedy, the refusal of Wei-hai-wei on the departure of the Japanese. The terms should be similar to those granted to Russia for Port Arthur." (*Parliamentary Papers* [1898], (54), *China*, No. 1, p. 54.) While Great Britain was meditating this step, the Chinese Government granted further concessions, this time to France, among them the lease for ninety-nine years of Kwang-chau Bay on the southwestern coast of China, which port France proceeded to occupy on April 22, 1898. The lease of Wei-hai-wei to Great Britain followed on July 1, 1898, in terms, as follows:

"In order to provide Great Britain with a suitable naval harbor in North China, and for the better protection of British commerce in the neighboring seas, the Government of His Majesty the Emperor of China agrees to lease to the Government of Her Majesty the Queen of Great Britain and Ireland, Wei-hai-wei in the Province of Shantung and the adjacent waters, for so long a period as Port Arthur shall remain in the occupation of Russia. . . .

". . . Within the above-mentioned territory leased Great Britain shall have sole jurisdiction.

"Great Britain shall have in addition the right to erect fortifications, station troops, or take any other measures necessary for defensive purposes, at any points on or near the coast of the region. . . . Within that zone Chinese administration will not be interfered with, but no troops other than Chinese or British shall be allowed therein.

"It is also agreed that within the walled city of Wei-hai-wei Chinese officials shall continue to exercise jurisdiction except so far as may be inconsistent with naval and military requirements for the defense of the territory leased.

"It is further agreed that Chinese vessels of war, whether neutral or otherwise, shall retain the right to use the waters herein leased to Great Britain."

In addition, Great Britain obtained Kowloon on the mainland opposite Hong Kong, for ninety-nine years on terms similar to those of the lease of Wei-hai-wei, with the following clause added:

"If cases of extradition occur they shall be dealt with in accordance with the existing treaties between Great Britain and China and the Hong Kong Regulations." (*Treaties between China and Foreign States*, vol. I, pp. 347-50.)

As one of the causes of the Russo-Japanese War was the presence of Russia in the Liao-tung Peninsula, the Treaty of Portsmouth, September 5, 1905, provided for the transfer to Japan of Russia's unexpired lease, as follows:

"The Imperial Russian Government transfer and assign to the Imperial Government of Japan, with the consent of the Government of China, the lease of Port Arthur, Talien, and adjacent territory and territorial waters and all rights, privileges, and concessions connected with or forming part of such lease, and they also transfer and assign to the Imperial Government of Japan all public works and properties in the territory affected by the above-mentioned lease.

"The two high contracting parties mutually engage to obtain the consent of the Chinese Government mentioned in the foregoing stipulation.

"The Imperial Government of Japan on their part undertake that the proprietary rights of Russian subjects in the territory above referred to shall be perfectly respected." (*Traité et Conventions entre l'Empire du Japon et les Puissances Etrangères*, vol. I, p. 588.)

In 1914, Japan entered the European War for the announced purpose of expelling Germany from Kiao-chau and restoring it to China. After the capture of Tsing-tau, a long list of demands was made by Japan upon China, several of them referring to the leases of Port Arthur and Kiao-chau. Much negotiation followed, but in May, 1915, a compromise was reached, the terms of which, in the matter of the leases, were as follows:

"A1. China consents to all the arrangements that may be made in the treaty of peace between Japan and Germany concerning the disposal of the rights, advantages, and concessions possessed by the latter *vis-à-vis* China in regard to the Province of Shantung in virtue of treaty agreements or otherwise."

"2. China shall not cede or lease to any power any portion of the Province of Shantung or any part of the seacoast thereof or any island along such coast. . . .

"B1. The terms of the lease of the Kwantung Province — Port Arthur and Dairen — and also of the South Manchurian and Antung-Mukden Railways, are extended to ninety-nine years from the dates of original agreements respectively. . . ." (London Times, May 11, 1915.)

(*Parliamentary Papers* [1898, 1899], *sub* China, *passim*; *Treaties between China and Foreign Powers*; *Traité et Conventions entre l'Empire du Japon et les Puissances Etrangères*.)

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## § 22. TITLE TO TERRITORY

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### THE FALKLAND ISLANDS (1829)

IN the year 1810 a revolution broke out in the Spanish Viceroyalty of Rio de la Plata, which, in the course of a few years, resulted in its complete severance from Spain. Ultimately, its vast territory became the seat of several independent states, successors to the Spanish sovereignty, among them the Argentine Republic. When, however, the Government of Buenos Ayres (that is, the Argentine Republic), in pursuance of what it conceived to be the principles of state succession, proceeded to provide for the administration of the Falkland Islands, it was met by protest from Great Britain on the ground of prior claim to ownership. A little later, also, the United States refused to recognize Argentine jurisdiction over the Falklands, more especially over the rights of fishery upon their coasts. The controversy raised at the time has never been settled by arbitral or diplomatic means, though the practical effect has been the possession and occupation of the Falklands by Great Britain for eighty-five years.

It was on June 10, 1829, that the Government of Buenos Ayres issued a decree, asserting sovereignty over the islands, as follows:

"When by the glorious revolution of the 25th of May, 1810, these provinces separated themselves from the dominion of the mother country, Spain held the important possession of the Islands of the Malvinas (Falkland Islands), and of all the others which approximate to Cape Horn, including that known under the denomination of Tierra del Fuego; this possession was justified by the right of being the first occupant, by the consent of the principal maritime powers of Europe, and by the proximity of these islands to the continent which formed the Viceroyalty of Buenos Ayres, unto which government they depended. For this reason, the Government of the Republic, having succeeded to every right which the mother country previously exercised over these provinces, and which its viceroys possessed, continued to exercise acts of dominion in the said islands, its ports, and coasts, notwithstanding circumstances have hitherto prevented this Republic from paying the attention to that part of the territory which, from its importance, it demands. Nevertheless, the necessity of no longer delaying such precautionary measures as shall be necessary to secure the rights of the Republic; and at the same time to possess the advantages which the productions of the said islands may yield, and to afford to the inhabitants that protection of which they stand in need, and to which they are entitled; the government has ordered and decreed, as follows:

"Art. 1. The Islands of the Malvinas, and those adjacent to Cape Horn in the Atlantic Ocean, shall be under the command of a political and military governor, to be named immediately by the Government of the Republic.

"Art. 2. The political and military governor shall reside in the Island de la Soledad, on which a battery shall be erected under the flag of the Republic.

"Art 3. The political and military governor shall cause the laws of the Republic to be observed by the inhabitants of the said islands, and provide for the due performance of the regulations respecting seal fishery on the coasts.

"Art. 4. Let this be made public. RODRIGUEZ."

*(British and Foreign State Papers, vol. XX, pp. 314-15.)*

As soon as this decree had been communicated to the British Government, it instructed its chargé d'affaires at Buenos Ayres to enter protest, which he did in the following note of November 19, 1829:

"... The undersigned has received the order of his court to represent to His Excellency that the Argentine Republic, in issuing this decree, have assumed an authority incompatible with His Britannic Majesty's rights of sovereignty over the Falkland Islands.

"These rights, founded upon the original discovery and subsequent occupation of the said islands, acquired an additional sanction from the restoration, by His Catholic Majesty, of the British settlement, in the year 1771, which, in the preceding year, had been attacked and occupied by a Spanish force, and which act of violence had led to much angry discussion between the Governments of the two countries.

"The withdrawal of His Majesty's forces from these islands, in the year 1774, cannot be considered as invalidating His Majesty's just rights. That measure took place in pursuance of a system of retrenchment, adopted at that time by His Britannic Majesty's Government; but the marks and signals of possession and property were left upon the islands: when the governor took his departure, the British flag remained flying, and all those formalities were observed which indicated the rights of ownership, as well as an intention to resume the occupation of the territory, at a more convenient season.

"The undersigned, therefore, in execution of the instructions of his court, formally protests, in the name of His Britannic Majesty, against the pretensions set up by the Government of Buenos Ayres, in their decree of the 10th of June, and against all acts which have been, or may hereafter be done, to the prejudice of the just rights of sovereignty which have heretofore been exercised by the Crown of Great Britain.

"The undersigned, etc.

"WOODBINE PARISH."

(*British and Foreign State Papers*, vol. xx, pp. 346-47.)

Even before the decree of June 10, 1829, the Government of Buenos Ayres had made grants of land and of exclusive fishing

rights in the Falklands to one, Lewis Vernet, who was later appointed governor of the islands. Vernet having seized and confiscated some American fishing vessels without process of law, the United States took vigorous measures to protect rights of fishery enjoyed for more than half a century, which, it maintained, could not be withdrawn without notice, "even supposing the rights of the Buenos Ayres Government to be uncontroverted." An American warship, the *Lexington*, was sent to the Falklands, which suppressed by force the operations of Vernet, but the incident afterwards became the subject of diplomatic discussion between the two governments, in the course of which the Argentine title to the Falklands was fully examined by the American representative at Buenos Ayres and an opinion expressed adverse to the claim of the Government of Buenos Ayres. (*British and Foreign State Papers*, vol. xx, pp. 338-55.) The view of the Secretary of State, Mr. Livingston, was set forth in a note to the American Chargé at Buenos Ayres, in 1832, wherein he expressed the belief that Patagonia had never been included in the Province of Buenos Ayres proper: "A project was formed by the Spaniards in 1778 of forming settlements there, but although the settlers came out to Monte Video the project was abandoned, and the whole of the continent, and islands of Terra del Fuego and Staten Land remain as unsettled and desert now as they were found at the time of their discovery." (Moore: *Digest of International Law*, vol. 1, p. 888.)

In a discussion with Great Britain, in 1834, a warning, issued by the Department of State to American fishermen resorting to the Falklands to respect British regulations, was silent about sovereignty, but "while it claimed no rights for the United States, it conceded none to Great Britain or any other power." (Moore: *Digest of International Law*, vol. 1, p. 888.)

While the United States was questioning the Argentine title to the Falklands, the Government of Great Britain proceeded to reoccupy the islands. On January 2, 1833, Commander Onslow, of H.M.S. *Clio*, acting under instructions, addressed to the commander of the Buenos Ayrean forces at Port Louis, in the Falklands, the following communication announcing the intended occupation:

"Sir: I have to acquaint you that I have received directions from His Excellency the Commander-in-Chief of His Britannic Majesty's ships and vessels of war, on the South American station, to exercise the rights of sovereignty over these islands, in the name of His Britannic Majesty.

"It is my intention to hoist, to-morrow morning, the national flag of Great Britain on shore; when I request you will be pleased to haul down your flag, and to withdraw your forces, taking with you all the stores, etc., belonging to your government.

"I am, etc.,

"J. J. ONSLOW, *Commander*.

"H. E., the Commander of the Buenos Ayrean Forces  
at Port Louis, Berkeley Sound."

(*British and Foreign State Papers*, vol. xx, p. 1197.)

The Argentine commander protested against the proposed action, but, as his forces were inferior, he offered no resistance, announcing that "it was his intention to depart, but that he would not strike the flag on shore." Accordingly, "at nine o'clock in the morning of the 3d, three boats manned with seamen and marines from the English sloop, landed at the point of Port Louis, and, placing a flagstaff at the house of an Englishman, about four squares distant from the commandancy, they hoisted thereon the British flag, and then proceeded to strike that of the Republic, which was still flying on shore, and which was immediately delivered up to the *Sarandí* by an officer sent for that purpose." (*British and Foreign State Papers*, vol. xx, p. 1196.)

As soon as the news of the occupation reached Buenos Ayres, the government made formal protest in a note addressed to the British Chargé, January 22, 1833. (*British and Foreign State Papers*, vol. xx, pp. 1198-99.) On April 24, its minister at London, M. Moreno, asked to be informed whether the British Government had really given the order to occupy the islands, and on April 27, Lord Palmerston, the Foreign Secretary, replied that the admiral on the station had been instructed by the government "to exercise the ancient and indisputable rights of sovereignty belonging to His Majesty." Thereupon, on June 17, M. Moreno sent to Lord Palmerston a note in which the rights of



the Republic to sovereignty over the Falklands were fully set forth and the British claim contested on the ground of antecedent Spanish rights. Lord Palmerston replied on January 8, 1834, denying the claims of the Republic and expressing the hope that "when the true circumstances of the case shall have been communicated to the knowledge of the Government of the United States of the Rio de la Plata, that government will no longer call in question the right of sovereignty which has been exercised by His Majesty as undoubtedly belonging to the Crown of Great Britain." (*British and Foreign State Papers*, vol. XXII, p. 1394.)

M. Moreno made further reply on December 29, 1834, but after that, the discussion was not continued. On December 31, 1835, President De Rosas, in his annual message to the legislature of the Province of Buenos Ayres, asserted that "the government will never desist from its obligation to demand of the justice of the British Cabinet, both an acknowledgment of the clear and unquestionable right of the Republic to those Islands and adequate reparation." (*British and Foreign State Papers*, vol. XXIII, p. 193.) This resolve was reiterated in the message of January 1, 1837, and four years later, M. Moreno, in a note to Lord Aberdeen, British Foreign Secretary, again expressed his government's "great regret that it has not hitherto obtained that satisfaction to which it believes itself entitled, and which it claimed in vain from the preceding administration." (*British and Foreign State Papers*, vol. XXXI, p. 1004.)

The question at issue involved the discussion of the principles of prior discovery, formal possession, and effective occupation as applicable to the rights of sovereignty. There was substantial agreement by all parties on the following points of historical fact:

1520. Magellan, sailing in the service of Spain, enters the strait which has since borne his name.

1527. The voyage of Loaisa in the same region.

1578. Sir Francis Drake discovers Cape Horn and "a cluster of islands."

1592. Davies said to have discovered the Falklands on his voyage to the South Seas.

1594. Hawkins sees the islands, giving them the name of Hawkins' Maiden-land.

1598. The islands visited by a Dutch squadron and named the Sabald Islands.

1616. Le Maire, in the Dutch service, doubles the Horn and gives it its name.

1689. Captain Strong, an English navigator, gives the islands the name of Falkland.

1700-1708. French navigators from St. Malo visit the islands and give them the name of Malouines, from which the Spanish name Malvinas is derived.

1764, February 3. The French, under M. de Bougainville, establish at Port Louis the first settlement on the Malouines. Spain, regarding this as a usurpation, asserts her title to them as a dependency of the continent of South America. France does not contest the Spanish claim.

1764, June 17. Commodore Byron instructed by the British Government to make a survey of the islands.

1765, January 23. Commodore Byron takes formal possession for Great Britain, under the name of Falkland Islands.

1766, January 8. Captain MacBride arrives at Port Egmont with a British military force and stations a garrison.

1766, October 4. M. de Bougainville signs an agreement to evacuate the islands on receiving compensation from Spain.

1767, March 27. Formal delivery of the French colony to Puente, the Spanish governor.

1770, June 10. A Spanish force under Admiral Madariaga dispossesses the British at Port Egmont.

1771, January 22. Spanish declaration restoring the Falklands to Great Britain, without affecting the "question of anterior right of sovereignty." British counter-declaration of same date is silent about any such right.

1771, September 16. Possession of Port Egmont formally restored to Great Britain.

1774, May 22. Great Britain withdraws her forces from Port Egmont, leaving "the marks and signals of possession" and the British flag still flying.

1790, October 28. Treaty of San Lorenzo between Spain and Great Britain. Neither party to form settlements south of coasts and islands then occupied by Spain. British subjects

not to fish in South Seas within ten leagues of any part of said coasts.

1810, May 25. Revolution in the United Provinces of Rio de la Plata.

1820, November 6. Colonel Daniel Jewett takes formal possession of the islands in the name of "the Supreme Government of The United Provinces of South America."

Based upon these data, the British claim may be thus summarized:

1. Prior discovery. At least, in the absence of certainty, it was contended, the British claim on this ground was as probable as the Spanish.
2. Formal possession by Commodore Byron in 1765. While admitting that the French had taken prior possession (in 1764), Great Britain contended that France by her retirement had confessed her lack of title and hence could transfer no rights to Spain. "If," as the American Chargé at Buenos Ayres expressed it in his note of July 10, 1832, "the doctrine assumed by Spain was correct, that France had not even a colorable title, the cession was a nullity; and it is a fact that Spain so regarded it, and relied on her prior rights alone, in her subsequent controversy with Great Britain." (*British and Foreign State Papers*, vol. xx, p. 345.)
3. Actual occupation in 1766.
4. The disavowal by Spain in 1771 of the dispossession of the British colony the year before and the subsequent restoration to Great Britain without "any secret understanding" that Great Britain "was pledged to restore the islands to Spain at a subsequent period."
5. The formalities observed on the evacuation in 1774, "calculated not only to assert the rights of ownership, but to indicate the intention of resuming the occupation of the territory at some future period."

Consequently, said Lord Palmerston, in his note of January 8, 1834, "the Government of the United Provinces could not reasonably have anticipated that the British Government would permit any other state to exercise a right, as derived from Spain, which

Great Britain had denied to Spain herself; and this consideration alone would fully justify His Majesty's Government in declining to enter into any further explanation upon a question which, upwards of half a century ago, was so notoriously and decisively adjusted with another government more immediately concerned." (*British and Foreign State Papers*, vol. XXII, p. 1386.)

The Spanish claims, upon which those of the Argentine Republic depend, were based upon similar principles, as follows:

1. Prior discovery — attributed by M. de Bougainville to Vesputius and by the *British Naval Chronicle* of 1809 to Magellan. (Note of M. Moreno in *British and Foreign State Papers*, vol. XXII, pp. 1370-71.)
2. Possession effectively asserted, when on protest from Spain Great Britain in 1754 renounced an intention on the part of the Admiralty under Lord Anson to establish a port of call in the Falklands.
3. The geographical position of the archipelago, as a dependency of the continental territory of Spanish America. This was urged successfully against France in 1764-67.
4. Prior occupation, the rights based upon which were derived from France in 1767, when the French establishment was formally handed over to Spain, all French rights having been extinguished by treaty and the payment of indemnity.
5. Reservation of the rights of sovereignty by Spain in 1771, and the subsequent exercise of acts of sovereignty by her after the abandonment of the islands by the British in 1774 — such acts as the nomination of governors, the maintenance of garrisons, and the exclusion of foreign vessels from the fisheries.
6. The implied recognition by Great Britain in the Treaty of 1790 of exclusive Spanish possession of the islands.

The Argentine Republic, as successor to the state rights of Spain, has asserted in support of its claims:

1. The acquisition by treaty of all Spanish rights.
2. Possession begun and exercised.

3. Recognition, tacit and explicit, by other states.
4. Prescription, "resulting from a possession uncontested and uninterrupted for fifty-nine consecutive years" (1774-1833).

"Accordingly," says Calvo, himself the Argentine Minister at Paris, writing in 1896, "the Argentine Republic maintains and will maintain over the islands in question, as long as the usurpation of its sovereign domain by the English Government continues, the absolute right of ownership which it holds impliedly from Spain, which was formally recognized in 1820, and the exercise of which would never have been interrupted save for the abuse of force on the part of Great Britain." (Calvo: *Droit International* [Paris, 1896], vol. 1, pp. 423-24.)

As far as can be ascertained there has been no more recent pronouncement upon the controversy.

(*British and Foreign State Papers*, vol. XX, pp. 311-441, 1194-99; vol. XXII, pp. 1366-94; vol. XXXI, pp. 1003-05; Calvo: *Droit International*, vol. 1, p. 417-24; Moore: *Digest of International Law*, pp. 876-90.)

## CHAPTER V

### THE RESTRICTIONS WHICH INTERNATIONAL LAW PLACES UPON THE EXERCISE OF JURISDICTION BY THE STATE WITHIN THE NATIONAL BOUND- ARIES

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#### § 23. PHYSICAL LIMITS WITHIN WHICH A STATE IS RECOG- NIZED AS SOVEREIGN AND RESPONSIBLE FOR THE ENFORCEMENT OF INTERNATIONAL LAW

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### THE FUR SEAL ARBITRATION

*Special Arbitral Tribunal at Paris, 1893*

In 1867, when the United States purchased Alaska, it acquired "all the territory and dominion" which the Emperor of Russia possessed "on the continent of America and in the adjacent islands." By the treaty the western boundary of the cession was defined as a line drawn through Behring Strait and southwesterly through Behring Sea "so as to include in the territory conveyed the whole of the Aleutian Islands." On reference to the map it will be seen that the major portion of Behring Sea lies to the east of this line, but whether or not the "dominion" conveyed implied jurisdiction over Behring Sea was in no way indicated in the treaty.

By an imperial ukase in 1821, Russia had reserved exclusively for Russian subjects the rights of commerce and fishing on the northwest coast of America down to 51° north latitude, and had asserted jurisdiction over Behring Sea to the distance of one hundred Italian miles from her coasts. This ukase was promptly protested by the United States and Great Britain, both of whom had territorial claims north of 51°. As a result of their protests, Russia receded from her extreme position and, by treaties in 1824 and 1825 with the United States and Great Britain respectively,

recognized that "her jurisdiction in said sea should be restricted to the reach of cannon shot from shore."

Soon after the cession of Alaska, the United States enacted legislation with a view to the protection of the fur seal and the regulation of the sealing industry. The islands of St. Paul and St. George in the Pribilof group, whither the seals resort during the breeding season, were set aside as "a special reservation for government purposes," and the right to take the seals on these islands was given to a company, under a strict lease limiting the number of seals to be taken per annum, and making it "unlawful to kill any fur seal upon the islands of St. Paul and St. George and in the waters adjacent thereto except during the months of June, July, September, and October." Just what extent of maritime jurisdiction was implied by "waters adjacent" was not specified. Opinion on the point, as expressed in Congress and by government officials, was not uniform, but in 1881 the Acting Secretary of the Treasury, in answer to an inquiry, stated that "all the waters within that boundary [the western boundary of the Alaskan cession] to the western end of the Aleutian Archipelago and chain of islands are considered as comprised within the waters of Alaska Territory."

In 1886 revenue officers of the United States seized three Canadian schooners which they found sealing in the Behring Sea, within waters over which the United States claimed jurisdiction, more than sixty miles from the nearest land. The vessels were taken to Sitka and condemned by the justice of the District Court at that place for violation of the sealing regulations of the United States. Diplomatic representation was at once made by Great Britain and the vessels were released; but in 1887 other Canadian sealing schooners were seized and condemned by the court at Sitka on the ground that Behring Sea was *mare clausum* and that the United States alone had jurisdiction over it. Negotiations were resumed and proposals made that the powers interested take joint action to prevent the extermination of the industry; but the negotiations were suspended in 1888, and next year the seizures were renewed. In the course of the communications that followed, the United States did not set up the claim of *mare clausum*, but justified the seizures on the ground that the Canadian ves-

sels, by engaging in pelagic sealing, were exterminating the fur seal, *contra bonos mores*.

After further seizures, protests, and negotiations, a treaty was finally concluded between the two powers on February 29, 1892, whereby the questions that had arisen were to be submitted to a tribunal of seven arbitrators, two to be named by the President of the United States, two by Her Britannic Majesty, and one each by the President of France, the King of Italy, and the King of Sweden and Norway. Article 6 of the treaty specified five points upon which the decision of the tribunal was sought, as follows:

- "1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?
- "2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?
- "3. Was the body of water now known as the Behring's Sea included in the phrase 'Pacific Ocean' as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after said treaty?
- "4. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring's Sea east of the water boundary, in the treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that treaty?
- "5. Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Behring's Sea, when such seals are found outside the ordinary three-mile limit?"

It was further provided, by article 7, that, if the decision on these points should be against the contentions of the United States, the arbitrators should determine "what concurrent regulations outside the jurisdictional limits of the respective governments are necessary, and over what waters such regulations should extend."

The tribunal, constituted in accordance with the treaty, held



its first session in Paris on February 23, 1893. The American arbitrators were Mr. Justice Harlan, of the Supreme Court of the United States, and Senator Morgan. Representing Great Britain on the tribunal were Lord Hannen, of the High Court of Appeal, and Sir John Thompson, Minister of Justice for Canada. The three neutral members were Baron de Courcel, chosen by the President of France, Marquis Venosta, by the King of Italy, and M. Gregers Gram, by the King of Sweden and Norway. Baron de Courcel was chosen president.

The United States, in its case, counter-case, and arguments, did not press the claim that Behring Sea was *mare clausum*, but maintained that, both in international law and by treaty with Russia, it had acquired a property in the fur seal, and, corollary to that, a right to protect it by "the practical prohibition of pelagic sealing in all the waters to which it resorts."

The situation, it was admitted, was a new one, but the principle involved was fundamental. International law was merely the international standard of justice and advanced by analogy. It was necessary that the decision of the tribunal be based upon the principle of right, for, in addition to usage and practice, "nations presumed to agree upon what natural and universal justice dictates." There was a distinction between exercising jurisdiction on the high seas and protecting one's property thereon. The Alaskan fur seal, being by nature a land animal, had its permanent home on the Pribilof Islands and was thus to be considered a natural product of the soil. It exhibited all the essentials of property: it submitted to the dominion of man, could be "husbanded" by him, and, though migrating seawards at stated seasons, always manifested the *animus revertendi*. The very existence of the Alaskan herd was due to the protection afforded it by Russia and the United States, and it was in order to extend such protection that Russia had issued her ukase of 1821. The objection to the ukase on the part of the United States had been made not against the right to protect Russian industries, but against unfounded territorial claims. The property was in the herd, rather than in the individual seals, and with the property right went a moral, and, in the view of the United States, a legal, right to protect this property wherever found.

But even if the seals themselves could not be protected by the United States, there remained the sealing industry on the islands. Might it be destroyed with impunity by pelagic sealing? The right of self-defense implies the right to protect industry, even on the high seas. The Ceylon pearl-fishery was a case in point, where such protection was exercised beyond the usual limits of jurisdiction, and further instances might be found in the revenue laws of both Great Britain and the United States.

Finally, over and above all technical arguments, it was urged that the United States held the seal industry in trust for the benefit of mankind, and that it was justified, in the contemplation of the law of nations, in taking all measures to prevent the extermination of the industry, even to the extent of seizing foreign sealing vessels upon the high seas.

In reply to these arguments, Great Britain maintained that international law, so far from having the comprehensive ethical basis contended for by the United States, comprised "only so much of the principle of morality and justice as the nations have agreed shall be part of those rules of conduct which shall govern their relations with one another." The test was the consent of nations — *placuisse gentibus*? An ocean fishery was a natural right and open to all, unless restricted by international agreement. Property in seals was without precedent, and protection in any case was limited to territorial waters. In all the instances cited by the United States where such protection had been exercised outside the ordinary limits, there was no attempt at extraterritorial jurisdiction over foreigners. The contention that Russia had exercised such jurisdiction was not borne out by the facts. The ukase of 1821 had been protested by both the United States and Great Britain, and down to 1867 Russia had exercised in Behring Sea only her strict rights according to international law. The western line in the treaty of cession had been drawn to divide the islands, not to transfer jurisdiction which did not exist. After 1867 the United States had legislated to protect the seals when on the islands only, not when found on the high seas.

As to the contention that the Alaskan seals presented all the essentials of property, Great Britain argued that seals were *fera*

*natura* (wild creatures) and hence *res nullius* (the property of no one). So far from being a land animal, the seal spent most of its time in the open sea; it got its food there, and went north to the islands merely for breeding purposes. While on the islands it could be said to be controllable by man, only because it was helpless. Nor could he be said to "husband" them except in a negative way by refraining from killing all. He did nothing to improve the breed or change their habits; and as to the *animus revertendi*, this doctrine, as establishing a property right, applied only to brief intervals of time, not to the movements of migratory animals. "The fur seal might as truly be said to have an *animus revertendi* to the ocean as an *animus revertendi* to the Pribilof Islands." Furthermore, to claim property in the seal herd, but none in the individual seals, was to beg the entire question of property rights. "The whole was made up of parts, and if there was no property in the parts, how could there be in the whole?" The United States could not maintain, for example, an action of trespass for the capture of an individual seal, and such an action was an ultimate test of a property right.

The argument that the property in the industry, as carried on in the islands, implied a right to protection in the Behring Sea, was likewise considered by Great Britain to be without ground in international law. Sealing on the high seas was lawful; indeed, the earliest form of the industry was pelagic. True, it might compete with the land industry to the disadvantage of the latter, but competition was an economic necessity that conditioned all industry. Acts of self-defense were, in the main, belligerent rights exercised in the face of exceptional emergencies. The historical attitude of the United States toward the principle of visit and search made for the support of the British contention in the present instance; nor were revenue laws, enforced beyond the accepted limits of maritime jurisdiction, any exception to the general principle, for they were always directed against an offense contemplated within municipal jurisdiction.

On the conclusion of the oral arguments, the tribunal deliberated behind closed doors upon the questions submitted. Agreement was finally reached on August 15, 1893, and the award signed by all seven arbitrators. In addition, they signed three

declarations which "were referred to the Governments of the United States and Great Britain for their consideration."

Summarized, the award was as follows:

On the first three points submitted — those concerning Russian jurisdiction — the tribunal decided that, from the time of the Russian treaties with the United States and Great Britain down to the time of the cession of Alaska, "Russia never asserted in fact or exercised any exclusive jurisdiction in Behring's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limits of territorial waters;" that Great Britain had obviously never conceded such claim; and that the phrase "Pacific Ocean" as used in the Treaty of 1825 included the Behring Sea. On all three points Justice Harlan voted with the majority, Senator Morgan dissenting.

On the fourth point the tribunal was unanimous in its decision that the United States had succeeded to all the rights of Russia "as to jurisdiction and as to the seal fisheries in the Behring Sea east of the water boundary."

On the fifth point — the important one of property rights — a majority of the arbitrators decided "that the United States had not any right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit." From this part of the award both American arbitrators dissented.

The decision having been against the claims of the United States, it was incumbent upon the tribunal, in accordance with article 7 of the treaty of arbitration, to agree upon regulations necessary for the protection and preservation of the seals in Behring Sea. This they did in nine articles which dealt specifically with the time, place, and manner of sealing "outside the jurisdictional limits of the respective governments." No seals were to be taken within sixty miles of the Pribilof Islands. There was to be a closed season each year from May 1 to July 31 in the part of the Pacific Ocean east of 180° longitude and north of 35° latitude as far as Behring Strait. Only sailing vessels could engage in sealing operations, for which special licenses were required. There was to be supervision of those engaged in the industry, but Indians were to be exempt from the scope of the regulations when

fishing for themselves. The use of nets, firearms, and explosives was prohibited. Lastly, the regulations were to remain in force "until they have been, in whole or in part, abolished or modified by common agreement," but every five years they were to be examined with a view to necessary revision.

The three declarations recommended to the two powers (1) the desirability of supplementary regulations within their respective jurisdictions; (2) a closed season everywhere for two or three years; and (3) the enactment of municipal measures to give effect to the regulations determined upon by the tribunal.

It may be added that, by a convention between the two governments in 1896, two commissioners were appointed to determine the amount of damages due Great Britain by reason of the seizures. After several sessions in Canada and the United States the sum of \$473,151.26 was agreed upon and duly paid by the Government of the United States in full settlement of all claims.

(*Proceedings*, 15 vols., published by the Government Printing Office, Washington; Moore: *International Arbitrations*, vol. I, pp. 755-961.)

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#### § 24. IMMUNITIES OF THE AGENTS OF INTERNATIONAL INTERCOURSE

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#### THE SCHNAEBELÉ INCIDENT (1887)

THE somewhat delicate relations between France and Germany in the early part of 1887 were suddenly strained to the breaking point by an incident which occurred on the Alsatian frontier. A French police inspector, who crossed the frontier on April 22 to hold an interview with a German official, was arrested in the railway station at Pagny by two agents of the German secret police. The indignation in France was dangerously increased by the report of the attorney-general at Nancy that the arrest had been made on French territory.

The French Cabinet, as it later became known, voted 6 to 5 against an ultimatum which would almost certainly have meant war. The President of the Council, Goblet, General Boulanger

and Admiral Aube, Lockroy, and Granet were in favor of sending the ultimatum, but President Grévy and the Minister of Foreign Affairs, Flourens, counseled patience and were able to muster a majority of one vote.

The incident was terminated by the following note which the German Chancellor, Count von Bismarck, transmitted April 28, 1887, to the French Ambassador at Berlin:

"In regard to the arrest of the French police commissioner Schnaebelé, the undersigned has given the matter a careful examination in which he has taken into account the information transmitted to him by His Excellency the Ambassador of the French Republic and the communications of the French Minister for Foreign Affairs transmitted through the intermediary of the German Chargé d'Affaires at Paris. The judicial authorities concerned in the affair have also been called upon to submit the papers setting forth the grounds for M. Schnaebelé's arrest.

"A copy of the more important of these documents, and especially the statement made by Schnaebelé after his arrest, together with the depositions of all the witnesses examined in the affair, has been given to the Ambassador of the French Republic. From these documents it is made clear beyond all doubt that the arrest occurred entirely on German territory, and that the French frontier was not crossed.

"The judicial proceedings directed against M. Schnaebelé related to the crime of high treason committed upon German territory, and were based upon conclusive evidence of his guilt, consisting in the confession of the German subject Klein and in his autograph letters mailed at Metz, which have since been admitted by Schnaebelé as coming from Klein. In consideration of his guilt, which Schnaebelé afterwards confessed to, the court ordered his arrest as soon as he should set foot upon German territory. This occurred on the 20th of the present month, when an opportunity was afforded by an appointment at the frontier made by the German police commissioner Gautsch to discuss official matters with Schnaebelé.

"Under the circumstances Schnaebelé's conviction cannot be considered as doubtful, and is still more sure to occur in that Schnaebelé in his reprehensible activity took advantage of his

official position which allowed him special opportunities because of the mutual confidence which both nations place in their official relations on the frontier. Schnaebelé has injured the indispensable confidence necessary for international intercourse by the manner in which he has taken advantage of his official position as a frontier official to induce German subjects to commit for pay criminal offenses against the Fatherland. This misuse of his official position increases, in the eyes of the court, the gravity of Schnaebelé's offense, irrespective of the question whether he acted at the direction of his superiors. The undersigned allows himself to make these observations in case, after Schnaebelé's release, he should again be found on German soil without the official understanding previously referred to, to protect him against arrest.

"The undersigned hopes that the French Ambassador will be convinced from his inspection of the communicated documents that the order issued by the court for Schnaebelé's arrest was well founded, and that its execution took place within German territory without any violation of French sovereignty. If, notwithstanding, the undersigned considers it his duty to request His Gracious Majesty, the Emperor, to order Schnaebelé's release, it is out of respect to the principle of international law which regards all crossings of the border, undertaken on the basis of an understanding between officials of neighboring states, as a tacit agreement of safe-conduct. It is impossible to believe that the German official, Gautsch, asked Schnaebelé to confer with him in order to facilitate his arrest. There are letters, however, which show that Schnaebelé's presence at the place where his arrest occurred was due to an understanding made with an official on this side of the frontier for the purpose of transacting business of common concern. If frontier officials engaged on such a mission should be subject to the process of the courts of the neighboring state, the consequence would be to render more difficult the handling of those matters which are incidental to the frontier relations between states. Such a result is not in conformity with the spirit and traditions of international relations at the present time. The undersigned is of the opinion that such interviews for the transaction of business must always be considered as covered by a

safe-conduct of the two governments. In this belief and with the full recognition of the perfect legality of the action taken by the German authorities, the undersigned has laid the matter before His Majesty the Emperor, who has decided, in consideration of the principle of international law which requires absolute security for international negotiations, to release Police Commissioner Schnaebelé, notwithstanding his arrest in German territory and notwithstanding the above-mentioned proofs exhibited against him. The undersigned makes this known to the Ambassador of the French Republic and announces at the same time that the requisite order for the release of Schnaebelé has been expedited, and begs His Excellency to accept the assurance of his highest consideration.

"VON BISMARCK."

(*Das Staatsarchiv*, vol. 48 [1889], Nos. 9596, 9597; Schulthess: *Europäischer Geschichtskalender* [1887], pp. III, 133-34, 328.)

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## § 25. LEGATIONS

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### THE NIKITCHENKOFF<sup>1</sup> CASE

*Court of Cassation, 1865*

THE reporter charged with presenting the case pointed out that "the attempts at assassination for which the appellant had been condemned to imprisonment for life with hard labor had been committed by a Russian subject upon a Russian subject within the interior of the Russian Embassy at Paris." After discussing the nature and extent of the diplomatic immunity and its application to the present case, the reporter draws attention "to the attitude in regard to the affair taken by the Russian Embassy, which, he remarks, so well understood that the principle to which it owed its protection was in no wise concerned in this matter, that appeal was made to the intervention of the French police. The arrest was made as a result of a demand from the embassy itself, and the trial continued with its concurrence and silence. May it

<sup>1</sup> Dalloz has *Mikitschenkoff*.



not be asked whether from this very circumstance the action taken was not both necessary and legal?" The reporter then alludes to the inapplicability for a foreign government to demand extradition in such a case and draws attention to the care "with which the Russian Government had abstained from making a demand of this nature."<sup>1</sup> But, he continues, "even had it been made, the fact was that the appellant had also in this case committed an attack upon a Frenchman engaged as a porter at the embassy and against an Italian who happened there by chance and who was placed under the protection of French law."

The decision of the Court of Cassation, section of Criminal Affairs, rendered October 13, 1865, was as follows:

"In regard to the plea brought forward that the offense complained of was committed by a Russian upon a Russian or foreign subject in the Russian Embassy at Paris, and consequently in a place outside of French territory, where French law was not applicable and to which the competence of our courts could not extend: — Whereas according to the terms of article 3, code Napoléon, the police regulations for the public safety are obligatory upon all those dwelling within their territory; — whereas it may be admitted, as an exception to this rule of public law, that international law in certain instances affords a personal immunity

<sup>1</sup> Notwithstanding what is said, it appears that the Russian Government did demand extradition. *The Solicitor's Journal* (1865-66, vol. x, p. 56) notes: "It will be remembered that this case gave rise to a diplomatic correspondence, the Russian Government having disputed the right of the French courts to try the murderer, and claimed a right to have him given up for trial in Russia." And de Martens, whose statement, in spite of its evident inaccuracy in dating the occurrence, may be taken as authoritative, says: "In this connection the question was raised as to whether the prisoner should be brought to trial before a French or a Russian court. The Government of the Tsar maintained from the beginning that the case was within the jurisdiction of the Russian courts, inasmuch as the crime had been committed in the residence of the ambassador and both victim and perpetrator of the violence were Russian subjects. But the French Government replied that the extraterritoriality of the embassy afforded no protection to criminals, and that moreover the French authorities entrusted with conducting the preliminary examination at the request of the embassy itself ought naturally to be considered competent to carry the case through to the end. The Cabinet of St. Petersburg yielded this point, reserving the right to take similar action in the future with reference to the French Embassy at St. Petersburg." (Translated from F. de Martens: *Traité de Droit International* [Paris, 1886], vol. II, p. 68.) The fact that the Russian Government yielded after contesting the French view of the fact gives of course increased value to the case as a precedent.

to foreign diplomatic agents and that by virtue of a legal fiction their residence is looked upon as situated outside the territory of the sovereign to whom they are accredited; — But whereas this legal fiction cannot be extended, whereas it is outside of the common law, and is confined strictly to ambassadors or ministers, whose independence it is designed to protect, and to their subordinates who nevertheless are invested with the like public character; — Whereas the plaintiff holds no office at the Russian Embassy, but, as a foreigner temporarily resident in France, is subject to French laws; whereas the place where the offense was said to have been committed can no longer be held as outside the limits of the territory so far as relates to the plaintiff personally, the operation and competence of the French judicial authorities being therefore beyond question; — Whereas they have acted, at the express request of the agents of the Russian Government, after the latter had turned the plaintiff over to be prosecuted; — Decided that on all these counts the plea invoked is not well founded. . . .”<sup>1</sup>

(Translated and condensed from Dalloz [1866], part 1, p. 233 ff.)

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## § 26. ARMED FORCES AND WARSHIPS

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### THE SCHOONER *EXCHANGE*

*The Supreme Court of the United States, 1812*

AN armed vessel sailing under the flag of Napoleon, Emperor of France, entered the port of Philadelphia, where shortly after her arrival she was arrested upon a libel filed August 24, 1811, against the schooner *Exchange*, by John M’Faddon, and William Greetham, setting forth that they were her owners on October 27, 1809, when she sailed from Baltimore bound to St. Sebastian, in Spain, and that she had been violently and forcibly taken by persons acting under the decrees and orders of Napoleon and dis-

<sup>1</sup> The rest of the opinion deals with exceptions to the competence of the court on technical grounds relating to the violation of the Code of Civil Procedure. On this latter ground also the court decided against the appeal.

posed of in violation of the rights of the libelants and of the law of nations. No claim was put in by any person, but the attorney for the district, acting by order of the executive department of the government, filed a suggestion to the effect that, a state of peace existing between the United States and France, the public vessels of France may freely enter and depart from the ports of the United States without seizure, arrest, detention, or molestation; that 'a certain public vessel of France known as the *Balaou*, having entered the port of Philadelphia for repairs, had not been seized in the manner described by the libelants, but that even if the said public vessel ever had been a vessel navigating under the flag of the United States and possessed by the libelants (which nevertheless the attorney did not admit), the property had since been divested. In consideration of these premises the attorney asked the court to quash the process of attachment, to dismiss the libel with costs, and to release the vessel.

On October 4, 1811, the district judge dismissed the libel with costs, upon the ground that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country so far as regards the question of title by which such sovereign claims to hold the vessel.

On appeal to the Circuit Court this sentence was reversed, October 28, 1811, and from the sentence of reversal the district attorney appealed to the Supreme Court of the United States.

*Chief Justice Marshall* delivered the opinion of the Supreme Court:

"This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

"The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

"In exploring an unbeaten path, with few, if any aids, from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

"The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

"This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

"The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

"This consent may, in some instances, be tested by common usage, and by common opinion growing out of that usage.

"A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

"This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory

only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

"1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

"If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

"Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

"Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

"2d. A second case, standing on the same principles with the

first, is the immunity which all civilized nations allow to foreign ministers.

"Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extraterritorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality [extraterritoriality] could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

"This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

"The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain, privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

"In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a

foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

"3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

"In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

"But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

"Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

"We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed.

"It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injuri-

ous, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privilege by its irregular and improper conduct. It may, however, well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

“But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without a special license, into a friendly port. A different rule, therefore, with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

“In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason



for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

"If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the court for distinguishing their case from that of vessels which enter by express assent.

"In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

"In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade.

"Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule, and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

"It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter

voluntarily and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.

“Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases, applies with full force to the exemption of ships of war in this.

“‘It is impossible to conceive,’ says Vattel, ‘that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power, and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation.’

“Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

“To the court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

“The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, its extent must

be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

"When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

"But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.

"Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

"Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have

exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

"Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern.

"The only applicable case cited by Bynkershoek, is that of the Spanish ships of war, seized in Flushing for a debt due from the King of Spain. In that case the States-General interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released.

"This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

"It seems then to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

"Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a

manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction.

"The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.

"The principles which have been stated, will now be applied to the case at bar.

"In the present state of the evidence and proceedings, the *Exchange* must be considered as a vessel, which was the property of the libelants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of the Emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title, by which the Emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

"If the preceding reasoning be correct, the *Exchange*, being a public armed ship, in the service of a foreign sovereign, with whom

the Government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

"If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

"I am directed to deliver it, as the opinion of the court, that the sentence of the Circuit Court reversing the sentence of the District Court, in the case of the *Exchange* be reversed, and that of the District Court, dismissing the libel, be affirmed."

(*The Schooner Exchange v. M'Faddon and others*, 7 Cranch, 116; 2 Curtis, 487.)

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#### § 27. ASYLUM

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### THE SPANISH WARSHIPS AT NEW ORLEANS (1862)

IN 1862, while the city of New Orleans was occupied by the forces of the United States, three Spanish men-of-war then in that port received on board a large number of passengers for Cuba, among whom were many citizens of the United States who, under the orders then in force, were not permitted to leave the city without passes. General Butler, the officer in command, claimed the right to search the vessels "for criminals other than rebels," and after much difficulty he obtained the privilege of searching two of the ships. In consequence of this occurrence, he prohibited the entry of Spanish men-of-war above the forts till further orders from the War Department. Mr. Seward, while recommending to the Secretary of War the suspension of the prohibition pending explanations from the Spanish Government, made urgent representations to the Spanish Minister. The Spanish Government, after considering the subject, defended the action of its naval officers on the ground that asylum at least for

political offenders might be granted on men-of-war. Mr. Seward refused to concede this claim, saying that the United States adhered to its former declaration that no ship of war of any nation would be expected to carry into or out from any port of the United States, which was either occupied by their forces or in the possession of the insurgents, any person who did not actually belong to the civil, military, or naval service of the country whose flag the vessel carried, and especially that ships of war should not, without express leave of the military authorities, carry into or out of such ports any citizen of the United States. It was only, said Mr. Seward, on an expected compliance with these terms that any foreign ship of war could enter a port in a military occupation during the Civil War.

(Extract from an article by J. B. Moore: *Asylum in Legations and Consulates and in Vessels*, in *Political Science Quarterly* [1892], vol. VII, pp. 410-11, citing *Dip. Cor.* [1863], part II, p. 915.)

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#### THE OVERTHROW OF BALMACEDA (1891)

DURING the summer of 1891, while the civil war growing out of the dispute between President Balmaceda and the Chilean Congress was raging, Mr. Egan, Minister of the United States at Santiago, afforded asylum to Señors Augustin Edwards and Eduardo Matte, prominent Congressionalists, on the ground, as he stated, that there was reason to apprehend that their lives were in danger. Subsequently Señor Edwards was given a safe-conduct and went to Callao, leaving Señor Matte in the legation. A few days later an unofficial intimation was conveyed to Mr. Egan through the dean of the diplomatic corps that the President was much annoyed at the granting of asylum to Congressionalists, and that if they did not leave immediately the legations might be searched, that of the United States being particularly mentioned. On hearing of this threat, Mr. Egan called at the Ministry of Foreign Relations and stated that, while he was prepared to discuss the question of asylum in a friendly spirit, his legation could not be searched but by force, and that he would himself shoot the first man who attempted to enter it for that purpose. On the following day he received from the President an assurance that

there was no intention to search any of the legations, "and above all that of the United States." (*House Ex. Doc.* 91, 52d Cong. 1st Sess., p. 64.)

On the 21st of August the army of Balmaceda was routed at Vifa del Mar; and the excitement and confusion which that event occasioned in Santiago culminated after the dispersion of his forces at Placillas on the 28th. His resignation on the 29th was followed by the demoralization of the military and police forces, and the houses of some of his prominent partisans were attacked. Toward evening, however, order was restored and all danger of further trouble seemed to vanish. Meanwhile many persons had sought refuge in the houses of the foreign ministers. The American Legation received eighty and the Spanish Legation about the same number. The Brazilian Legation received eight; the French, five; the Uruguayan, several; the German, two; the English, one, perhaps involuntarily.<sup>1</sup> Balmaceda took refuge in the Argentine Legation. On the subsidence of the first excitement, many of the refugees left the legations, some seeking concealment elsewhere and others giving bond to appear before the tribunals. Such was the course pursued by the refugees in the Brazilian and French Legations. The refugee in the English Legation went out immediately to his own house, promising to remain there. Balmaceda committed suicide in the Argentine Legation on the 19th of September. One refugee, General Velasquez, ex-Minister of War, remained in the German Legation, but, encouraged by the German Minister, he proposed to give himself up as soon as he had sufficiently recovered from the effects of an accident from which he was suffering. In no instance was safe-conduct granted.

No trouble occurred till the 22d of September, when the government, alleging that the refugees and their friends were abusing the privilege of asylum, began to police the American and the Spanish Legations. At that time there were nineteen refugees in

<sup>1</sup> In a dispatch of August 31, Mr. Egan says that "the only legation which closed its doors and denied asylum was that of England, which refused to admit a single person." In a telegram of September 27 he states that two persons entered the British Legation. In a dispatch of September 29, he states that "one or two" got in "across the roof" of a neighboring house that was being searched. Subsequently he states that there was one. But the original statement is doubtless correct, in so far as it represents the policy of the British Legation. (Note by J. B. Moore.)



the former and five in the latter; and on the first three days of the surveillance many persons were interfered with in entering or in leaving the buildings. Mr. Egan protested against the course of the government, contending that its action was without precedent and violative of the rights of the legation, while Señor Matta, the Minister for Foreign Affairs, replied in a manner not calculated to allay irritation. In view of what has been shown to have been the practice in cases of asylum, to say nothing of the opinions of publicists on the subject, the policing of a minister's domicile, when it is used as a shelter for refugees, does not present a ground for complaint. On the other hand, any excesses that may be committed in the enforcement of such a measure may form a subject for representation with a view to their correction. Mr. Egan not only protested against particular acts which he regarded as unwarrantable, but also against the surveillance itself. Señor Matta declined to consider the protests even against particular acts as a subject for discussion. Nevertheless, after September 25 the strictness of the surveillance was relaxed, though for several days in the latter part of December it was again closely enforced, especially about the Spanish Legation.

On September 29 the number of refugees in the American Legation had been reduced to fifteen, one of whom not long afterward went out on bond. On January 9, 1892, Mr. Egan escorted two refugees to Valparaíso and put them on board the United States man-of-war *Yorktown*. On the 13th he and the Spanish and Italian Ministers disposed of seven refugees in the same manner — five from the American and two from the Spanish Legation. These were all that remained. What had become of the rest does not appear, though the correspondent of the *Herald*, in a dispatch from Valparaíso of January 13, stated that one of the nine who were apparently in the American Legation at the opening of the year had determined to stay in Chile "and fight his case out in the courts." The refugees were transported on the *Yorktown* to Callao, Señor Pereira, who had succeeded Señor Matta in the Foreign Office, refusing to guarantee their security on private vessels calling at Chilean ports; and he expressed displeasure at the minister's accompanying them, apparently being averse to the display of any sign of diplomatic authority in the matter.

With the departure of the refugees, the police were removed from about the diplomatic residences.

In discussing the question of safe-conducts, Mr. Egan and Señor Matta set forth their views as to the legal foundations and limitations of asylum. They both accepted the extraterritoriality of a minister's domicile, but while Señor Matta deduced from that notion merely the right to grant asylum, Mr. Egan pushed it further. Señor Matta argued that safe-conducts might have been and might be given, not in virtue of any right on the part of a legation to demand them, but "of the courtesy, convenience, and will" of the government, and with due consideration for its own laws and interests; and he maintained that safe-conducts could not be granted for men who, as was the case with the refugees in question, had been submitted to the tribunals. Mr. Egan replied that his house was "an integral part of the United States," and that "without the will and permission" of that government, Chile "could not consider" as subject to her "judicial action" persons "who, from every point of view," were "beyond its jurisdiction;" and he added that as Señor Matta had recognized that safe-conducts had been and might be given "as acts of courtesy and at the spontaneous will of the government," he could not be surprised if the United States should "interpret as an act of but slight courtsey and consideration" the refusal of the Chilean Government now to grant them "in accordance with the respect due to the invariable practice and international policy of Chile."

(Extract from an article by J. B. Moore: *Asylum in Legations and Consulates and in Vessels*, in *Political Science Quarterly* [1892], vol. VII, pp. 226-29.)

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## § 28. MERCHANT VESSELS

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### THE CASES OF THE *SALLY* AND THE *NEWTON* (1806)

*Opinion of the Council of State in regard to the question of competence in the matter of offenses committed on board neutral vessels in ports and roads of France, November 20, 1806.*

THE Council of State, having had the matters referred to them by His Majesty and having heard thereon the report of the

division on legislation made by the Grand Judge, the Minister of Justice, with respect to the limits of jurisdiction claimed of America in the ports of tion with offenses committed in the ports and roads of

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cannot be regarded vaguely action which it is accorded in jurisdiction incompetent for he state; d into a port of the state is verving the place where it is

qually amenable to the courts they may commit, even on rew, as well as for agree- ) which they may enter with

this point local jurisdiction is respect to offenses committed nber of a neutral crew upon

the neutral power should be discipline of the vessel, with ere when its aid is not sought is not endangered; tion, which is indicated in the onformity with usage, is the r in this matter;

two particular cases in which claimed jurisdiction; cases, it is a question of a cutter of the American ship same ship; and in the other, first mate of the ship Sally made ready a cutter without

room for entertaining the claim

and forbidding the French courts from taking cognizance of the two cases abovenamed.

(Translation: *Collection Complète des Lois, Décrets, Ordonnances, Réglemens et Avis du Conseil-d'Etat . . . de 1788 à 1824 inclusive-ment* [Paris, 1826], vol. xvi, p. 65.)

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### THE CASE OF THE CREOLE (1853)

IN the course of the thirties in a number of instances (the *Comet*, *Encomium*, *Enterprise*, and *Hermosa*), when American vessels transporting slaves from one American port to another were driven by stress of weather or other accident to take refuge in British ports, the local authorities had liberated their human cargo in spite of the vigorous protests of the American Consuls. Because of this action the United States made vigorous protests to the British Government without receiving the redress it claimed.

In 1840 the Senate adopted a resolution declaring that, where a vessel on the high seas, in time of peace, engaged in a lawful voyage, was forced by stress of weather or other unavoidable circumstance into the port of a friendly power, the country to which she belonged lost "none of the rights appertaining to her on the high seas, either over the vessel or the personal relations of those on board."

The excitement created by these incidents culminated in the case of the brig *Creole*, which sailed from Hampton Roads for New Orleans on the 27th of October, 1841, having on board one hundred and thirty-five slaves. On the night of the 7th of November a portion of the slaves revolted, wounded the master, chief mate, and two of the crew, and murdered one of the passengers, and having secured possession of the vessel, ordered the mate, under pain of death, to steer for Nassau, where the brig arrived on the 9th of November. The slaves were afterwards liberated, under circumstances disclosed below in the opinion of Mr. Bates, umpire of the mixed commission under the treaty between the United States and Great Britain of 1853, to which commission the cases of the *Enterprise*, *Hermosa*, and *Creole* were ultimately submitted, on claims for damages.

In the cases of the *Comet* and *Encomium*, which respectively occurred in 1831 and February, 1833, Great Britain in the latter part of President Van Buren's Administration paid an indemnity of \$116,179.62. But in the cases of the *Enterprise*, *Hermosa*, and *Creole*, which occurred after August 1, 1834, when the act of Parliament of August 28, 1833, for the abolition of slavery in the British colonies took effect, the British Government refused to acknowledge any liability on the ground that the slaves on entering British jurisdiction became free. The United States, on the other hand, maintained that if a vessel were driven by necessity to enter the port of another nation the local law could not operate so as to affect existing rights of property as between persons on board, or their personal obligations or relations under the law of the country to which the vessel belonged. In the case of the *Creole* this argument was emphasized by the fact that the vessel was brought into British jurisdiction by means of a crime against the law of the flag. The case gave rise to animated discussions in the British Parliament as well as in the Congress of the United States, and came near breaking up the negotiations between Mr. Webster and Lord Ashburton in 1842.

Bates, umpire in the case of the *Creole* under the convention between the United States and Great Britain of February 8, 1853, rendered the following opinion:

"This case having been submitted to the umpire for his decision, he hereby reports that the claim has grown out of the following circumstances:

"The American brig *Creole*, Captain Ensor, sailed from Hampton Roads, in the State of Virginia, on the 27th October, 1841, having on board one hundred and thirty-five slaves, bound for New Orleans. On the 7th November, at nine o'clock in the evening, a portion of the slaves rose against the officers, crew, and passengers, wounding severely the captain, the chief mate, and two of the crew, and murdering one of the passengers; the mutineers, having got complete possession of the vessel, ordered the mate, under threat of instant death should he disobey or deceive them, to steer for Nassau, in the island of New Providence, where the brig arrived on the 9th November, 1841.

"The American Consul was apprised of the situation of the

vessel, and requested the governor to take measures to prevent the escape of the slaves, and to have the murderers secured. The consul received reply from the governor, stating that under the circumstances he would comply with the request.

"The consul went on board the brig, placed the mate in command in place of the disabled master, and found the slaves all quiet.

"About noon twenty African soldiers, with an African sergeant and corporal, commanded by a white officer, came on board. The officer was introduced by the consul to the mate as commanding officer of the vessel.

"The consul, on returning to the shore, was summoned to attend the governor and council, who were in session, who informed the consul that they had come to the following decision:

"1st. That the courts of law have no jurisdiction over the alleged offenses.

"2d. That, as an information had been lodged before the governor, charging that the crime of murder had been committed on board said vessel while on the high seas, it was expedient that the parties, implicated in so grave a charge, should not be allowed to go at large, and that an investigation ought therefore to be made into the charges, and examinations taken on oath; when, if it should appear that the original information was correct, and that a murder had actually been committed, that all parties implicated in such crime, or other acts of violence, should be detained here until reference could be made to the Secretary of State to ascertain whether the parties should be delivered over to the United States Government; if not, how otherwise to dispose of them.

"3d. That as soon as such examinations should be taken, all persons on board the *Creole*, not implicated in any of the offences alleged to have been committed on board the vessel, must be released from further restraint.'

"Then two magistrates were sent on board. The American Consul went also. The examination was commenced on Tuesday, the 9th, and was continued on Wednesday, the 10th, and then postponed until Friday, on account of the illness of Captain Ensor.

On Friday morning it was abruptly, and without any explanation, terminated.

"On the same day, a large number of boats assembled near the *Creole*, filled with colored persons armed with bludgeons. They were under the immediate command of the pilot, who took the vessel into the port, who was an officer of the government, and a colored man. A sloop or larger launch was also towed from the shore and anchored near the brig. The sloop was filled with men armed with clubs, and clubs were passed from her to the persons in the boats. A vast concourse of people were collected on shore opposite the brig.

"During the whole time the officers of the government were on board they encouraged the insubordination of the slaves.

"The Americans in port determined to unite and furnish the necessary aid to forward the vessel and negroes to New Orleans. The consul and the officers and crews of two other American vessels had, in fact, united with the officers, men, and passengers of the *Creole* to effect this. They were to conduct her first to Indian Quay, Florida, where there was a vessel of war of the United States.

"On Friday morning, the consul was informed that attempts would be made to liberate the slaves by force, and from the mate he received information of the threatening state of things. The result was, that the attorney-general and other officers went on board the *Creole*. The slaves, identified as on board the vessel concerned in the mutiny, were sent on shore, and the residue of the slaves were called on deck by direction of the attorney-general, who addressed them in the following terms: 'My friends,' or, 'my men, you have been detained a short time on board the *Creole* for the purpose of ascertaining what individuals were concerned in the murder. They have been identified, and will be detained. The rest of you are free, and at liberty to go on shore, and wherever you please.'

"The liberated slaves, assisted by the magistrates, were then taken on board the boats, and when landed were conducted by a vast assemblage to the superintendent of police, by whom their names were registered. They were thus forcibly taken from the custody of the master of the *Creole*, and lost to the claimants.

"I need not refer to authorities to show that slavery, however odious and contrary to the principles of justice and humanity, may be established by law in any country; and, having been so established in many countries, it cannot be contrary to the law of nations.

"The *Creole* was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations. Her right to navigate the ocean could not be questioned, and as growing out of that right, the right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity.

"A vessel navigating the ocean carries with her the laws of her own country, so far as relates to the persons and property on board, and to a certain extent, retains those rights even in the ports of the foreign nations she may visit. Now, this being the state of the law of nations, what were the duties of the authorities at Nassau in regard to the *Creole*? It is submitted the mutineers could not be tried by the courts of that island, the crime having been committed on the high seas. All that the authorities could lawfully do, was to comply with the request of the American Consul, and keep the mutineers in custody until a conveyance could be found for sending them to the United States.

"The other slaves, being perfectly quiet, and under the command of the captain and owners, and on-board an American ship, the authorities should have seen that they were protected by the law of nations; their rights under which cannot be abrogated or varied, either by the emancipation act or any other act of the British Parliament.

"Blackstone, 4th volume, speaking of the law of nations, states: 'Whenever any question arises, which is properly the object of its jurisdiction, such law is here adopted in its full extent by the common law.'

"The municipal law of England cannot authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offense, and forcibly dissolving the relations which by the laws of his country the captain is bound to preserve and enforce on board.

"These rights, sanctioned by the law of nations — viz.: the right to navigate the ocean, and to seek shelter in case of distress or



other unavoidable circumstances, and to retain over the ship, her cargo, and passengers, the laws of her own country — must be respected by all nations; for no independent nation would submit to their violation.

“Having read all the authorities referred to in the arguments on both sides, I have come to the conclusion that the conduct of the authorities at Nassau was in violation of the established law of nations, and that the claimants are justly entitled to compensation for their losses. I therefore award to the undermentioned parties, their assigns, or legal representatives, the sums set opposite their names, due on the 15th of January, 1855.” The total amount awarded was \$110,330.

(Extracted and condensed from Moore: *Digest of International Law*, vol. II, pp. 350-61.)

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## THE WILDENHUS CASE

*The Supreme Court of the United States, 1886*

THIS was an appeal by the Belgian Consul for the States of New York and New Jersey in the United States for himself as consul in behalf of Wildenhus and two others for their release upon a writ of *habeas corpus* from the custody of the keeper of the jail. The facts as stated in the application recount that on or about October 6, 1886, Wildenhus, on board the Belgian steamship *Nordland*, stabbed one Figens and inflicted a wound from which he afterwards died. Wildenhus and Figens were both members of the crew and subjects of Belgium, where they had their domicile. The *Nordland* was lying moored at the dock of the port of Jersey City at the time and the whole affray took place below decks, so that the tranquillity of the port was in no wise disturbed or injured thereby. All the witnesses of the affray were without exception members of the crew. The application further cited certain articles from the Belgian decree of March, 1857, relating to consuls, authorizing and defining the jurisdiction which they might exercise on Belgian merchant vessels in the ports and harbors of their consular districts.

Article 11 of a convention between the United States and Bel-

gium "concerning the rights, privileges, and immunities of consular officers," concluded March 9, 1880, and proclaimed by the President of the United States, March 1, 1881 (21 St. 123), is as follows: "The respective consuls general, consuls, vice-consuls, and consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore or in the port, or when a person of the country, or not belonging to the crew, shall be concerned therein. In all other cases, the aforesaid authorities shall confine themselves to lending aid to the consuls and vice-consuls or consular agents, if they are requested by them to do so, in causing the arrest and imprisonment of any person whose name is inscribed on the crew list, whenever, for any cause, the said officers shall think proper."

The claim of the consul was that, by the law of nations and the provisions of this treaty, the offense with which Wildenhus had been charged was "solely cognizable by the authority of the laws of the Kingdom of Belgium," and that the State of New Jersey was without jurisdiction in the premises. The Circuit Court refused to deliver the prisoners to the consul, and remanded them to the custody of the jailer. To reverse that decision this appeal was taken.

*Chief Justice Waite*, after stating the facts substantially as recited above, continued, delivering the opinion of the court:

"By sections 751 and 753 of the Revised Statutes the courts of the United States have power to issue writs of *habeas corpus* which shall extend to prisoners in jail when they are in 'custody in violation of the Constitution or a law or treaty of the United States,' and the question we have to consider is whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

"It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes,

unless, by treaty or otherwise, the two countries have come to some different understanding or agreement. . . .

"From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel, or among themselves. And so by comity it came to be generally understood among civilized nations, that all matters of discipline and all things done on board which affected only the vessel or those belonging to her and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce, should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions."

The opinion, after a brief historical review of the various provisions of the earlier treaties, continues:

"The form of the provision found in the present convention with Belgium first appeared in a convention with Austria concluded in 1870, art. 11 (17 St. 827), and it is found now in substantially the same language in all the treaties and conventions which have since been entered into by the United States on the same subject. See the conventions with the German Empire in 1871, art. 13 (17 St. 927); with the Netherlands in 1878, art. 11 (21 St. 668); with Italy in 1881, art. 1 (22 St. 832); with Belgium in 1881, as stated above; and with Roumania, the same year, art. 11 (23 St. 714).

"It thus appears that at first provision was made only for giving consuls police authority over the interior of the ship, and jurisdiction in civil matters arising out of disputes or differences on board, that is to say, between those belonging to the vessel. Under this police authority the duties of the consuls were evidently confined to the maintenance of order and discipline on board. This gave them no power to punish for crimes against the peace of the country. In fact, they were expressly prohibited from interfering with the local police in matters of that kind. The cases of the *Sally* and the *Newton* are illustrative of this position. That of the *Sally* related to the discipline of the ship, and that of the *Newton* to the maintenance of order on board. In neither case was the disturbance of a character to affect the peace or the dignity of the country.

"In the next conventions consuls were simply made judges and arbitrators to settle and adjust differences between those on board. This clearly related to such differences between those belonging to the vessel as are capable of adjustment and settlement by judicial decision or by arbitration, for it simply made the consuls judges or arbitrators in such matters. That would of itself exclude all idea of punishment for crimes against the state which affected the peace and tranquillity of the port; but, to prevent all doubt on this subject, it was expressly provided that it should not apply to differences of that character.

"Next came a form of convention which in terms gave the consuls authority to cause proper order to be maintained on board, and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is substantially all there is in the convention with Belgium which we have now to consider. This treaty is the law which now governs the conduct of the United States and Belgium towards each other in this particular. Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board a merchant vessel, but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.

"The treaty is part of the supreme law of the United States,

and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done — the disorder that has arisen — on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the 'public repose,' of the people who look to the State of New Jersey for their protection. If the thing done — 'the disorder,' as it is called in the treaty — is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they as a rule care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads, and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a 'disorder,' the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a 'disorder' which will 'disturb tranquillity and public order on shore or in the port.' The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with ex-

clusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction; and that, if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.

“This is fully in accord with the practice in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of the *Sally* and the *Newton*, by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of *Jally*, the mate of an American merchantman, who had killed one of the crew and severely wounded another on board the ship in the port of Havre, the Court of Cassation, the highest judicial tribunal of France, upon full consideration held, while the Convention of 1853 was in force, that the French courts had rightful jurisdiction, for reasons which sufficiently appear in the following extract from its judgment: ‘Considering that it is a principle of the law of nations that every state has sovereign jurisdiction throughout its territory; considering that, by the terms of article 3 of the Code Napoléon, the laws of police and safety bind all those who inhabit French territory, and that consequently foreigners, even *transeuntes* [in transit], find themselves subject to those laws; considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government; considering that every state is interested in the repression of crimes and offenses that may be committed in the ports of its territory, not only by the men of the ship’s company of a foreign merchant

vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime by common law [*droit commun*, the law common to all civilized nations], the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory.' 1 Ortolan, *Diplomatie de la Mer* (4th ed.), 455, 456; Sirey (N. S.) 1859, p. 189.

"The judgment of the Circuit Court is affirmed."

(Condensed and extracted from *United States Reports*, vol. 120, p. 1 *et seq.*)

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## § 29. RIGHTS OF ALIENS

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### THE TORREY CASE

*American-Venezuelan Mixed Claims Commission, 1903*

*Dr. José de J. Paul*, Venezuelan Commissioner (for the commission):

"Charles W. Torrey claims from the Government of Venezuela the sum of \$10,000 for damages caused by unjust arrest at the port of La Guaira, on May 3, 1876, and for personal ill treatment in connection therewith.

"The memorialist bases his pretension on the following facts:

"Early in the year 1876 he went to Curaçao for health and pleasure. Shortly after his arrival there he concluded to go to Venezuela to see the country and visit its capital, Caracas. After remaining in Caracas for about a week, he concluded to return to Curaçao, by the English royal mail steamer *Severn*. On the 9th of May, 1876, after having obtained a passport with all the necessary *visés* by the authorized officers of the Venezuelan Government in Caracas, he started for La Guaira, where he intended taking the

steamer *Severn* back to Curaçao. With him at the same time were a Mr. Bartram and Dr. Elbert Nostrand, also citizens of the United States. The steamer was lying out in the stream and the three embarked on a boat belonging to said steamer to reach it. While on the way to said steamer they were hailed from shore and ordered back and commanded to report to the civil officer in charge at La Guaira. This officer ordered them all to be imprisoned in the common jail. Torrey claims that he was lodged in a cell with many low prisoners, his cell containing no other accommodation or furniture than a common table and a set of wooden stocks. His request to remain at the hotel under guard, although he was suffering from an attack of inflammatory rheumatism, was arbitrarily refused, and he was taken to jail, and kept in said prison for four hours. He was released through the immediate exertions of the United States Consul at La Guaira and the United States representative at Caracas, and he took the steamer bound for Curaçao the same evening at 7 o'clock.

"Among the documents presented there is a copy of the communication addressed on the 12th of June, 1885, by the honorable Secretary of State, T. F. Bayard, to Mr. Torrey in reference to his claim, which in itself is sufficient to fix the appreciation that this Commission must make about the fact of the unjust arrest suffered by Mr. Torrey for a few hours in the port of La Guaira. Said communication reproduces the opinion of Mr. Evarts, Secretary of State, contained in a letter addressed by him to the said claimant on April 5, 1877, after having examined the voluminous diplomatic correspondence caused by this affair. This opinion was as follows:

"“Though the Department would have preferred that the apology for your arrest should have come directly from that functionary [President Guzmán Blanco], the fact that he ordered his chief of police to make it may be regarded as sufficient. Your complaint may, however, be taken into consideration when diplomatic intercourse with Venezuela shall be resumed, but you [Mr. Torrey] must not expect that this Department will authorize a demand for vindictive damages.”

"Mr. Bayard, in the same communication, adds:



"Under the circumstances of the case as herein presented, further diplomatic intervention in your behalf is thought to be neither expedient or proper. The Department must, therefore, regard the matter as practically closed, unless you can show to it that the apology made was not a sufficient atonement for the injury done to you, or that an error has accrued to your prejudice in the Department's decision.

"This decision need not, however, prejudice your ultimate rights if you see fit to present and support a claim before any international tribunal which may hereafter be organized to take cognizance of cases arising since the award of the late Caracas Commission.'

"As it appears from the above communications, and as it is plainly shown by the voluminous correspondence between the two Departments of Foreign Affairs of both governments, the incident of the four hours' arrest of the American citizen, Charles W. Torrey, in the port of La Guaira was the act of a local officer, and was due to special circumstances of that epoch, in which act there was no intention to hurt, by any means, the person of an American citizen, and, on the contrary, the same gave occasion for the President of the Republic, General Guzmán Blanco, as soon as he knew of said arrest to order by telegraph that the prisoners be put at liberty, thus:

"*Gen. J. J. Yépez*: Those gentlemen should not have taken passage to Curaçao when their passports were for the United States of America, but I have reason to confide in them; thus, I expect you will put them at liberty, stating to them that you are sorry for what has happened. The steamer has my permission to leave as soon as those gentlemen are on board.

GUZMAN BLANCO.'

"In view of the foregoing, and regarding the compensation to be given in this case as limited to reparation for the personal inconvenience and discomfort suffered by the claimant during his brief detention, an award will be made in the sum of \$250 United States gold."

(*Venezuela Arbitrations of 1903*, prepared by J. H. Ralston [Washington, 1904], pp. 162-64.)

## THE CADENHEAD CASE

*American and British Claims Arbitration Tribunal, 1914*

THE following decision was rendered in this case May 1, 1914:

"His Britannic Majesty's Government present a memorial in this case 'in support of the claim respecting the killing of Elizabeth Cadenhead,' a British subject, who left next of kin her surviving as stated in annex 1 of the memorial, all of whom are British subjects. The amount claimed as compensation for the death of Miss Cadenhead is twenty-five thousand dollars (\$25,000).

"The death of Miss Cadenhead occurred under the following circumstances:

"July 22, 1907, Miss Cadenhead with her brother, George M. Cadenhead, and Katharine Fordyce Cadenhead were at Sault Ste. Marie, a city in the State of Michigan, United States of America; it was about 3.30 P.M. and they were returning to the city from a visit to a military post named Fort Brady, the entrance of which is situated on a public highway, called South Street. They were proceeding along the sidewalk of South Street, and when at about two hundred yards from the entrance of the fort, Miss Cadenhead was hit by a rifle-shot and instantly killed.

"The shot was fired by a private soldier belonging to Company M of the Seventh Infantry, garrisoned at Fort Brady, and was aimed at a military prisoner, who was escaping from his custody when at work just at the entrance of the fort on South Street, by running easterly along the sidewalk on that street in the rear of the Cadenhead party.

"His Britannic Majesty's Government contend that this soldier was not justified in firing upon an unarmed man on a public highway, that he acted unnecessarily, recklessly, and with gross negligence, and that compensation should be paid by the Government of the United States on the ground that under the circumstances it was responsible for the act of this soldier.

"The question whether or not a private soldier belonging to the United States Army and being on duty acted in violation of or in conformity with his military duty is a question of municipal

law of the United States, and it has been established by the competent military court of the United States that he acted in entire conformity with the military orders and regulations, namely, section 365 of the Manual of Guard Duty, United States Army, approved June 14, 1902.

"The only question for this tribunal to decide is whether or not, under these circumstances, the United States Government should be held liable to pay compensation for this act of its agent.

"It is established by the evidence that the aforesaid orders under which this soldier, who fired at the escaping prisoner, acted, were issued pursuant to the national law of the United States for the enforcement of military discipline, and were within the competency and jurisdiction of that government.

"It has not been shown that there was a denial of justice, or that there were any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and has no greater rights than nationals of that country.

"Furthermore, no evidence is offered and no contention is made as to any personal pecuniary loss or damage resulting to the relatives or legal representatives of the unfortunate victim of the accident, and it is to be noted that this is a pecuniary claim based on alleged personal wrongs of nationals of Great Britain, as appears from its inclusion in clause 3 of the schedule of claims in the Pecuniary Claims Convention, under which it is presented.

"Under those conditions the tribunal is of the opinion that in the circumstances of this case no pecuniary liability attaches to the Government of the United States.

"It should be said, however, that it may not have been altogether prudent for the United States authorities to permit prisoners under the charge of a single guard, to be put at work just at the entrance of a fort on a public highway in a city, and order or authorize that guard, after allowing one of these prisoners to escape under these circumstances, to fire at him, while running along that highway.

"This tribunal, therefore, ventures to express the desire that the United States Government will consider favorably the pay-

ment of some compensation as an act of grace to the representatives of Miss Cadenhead, on account of the unfortunate loss of their relative, under such distressing circumstances.

"On these motives the tribunal decides that with the above recommendation, the claim presented by His Britannic Majesty's Government in this case be disallowed.

"The President of the Tribunal,

"HENRI FROMAGEOT.

"WASHINGTON, May 1, 1914."

(*American Journal of International Law* [1914], vol. VIII, pp. 663-65.)

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### THE NEW ORLEANS LYNCHING (1891)

ONE of the difficulties attendant upon the adjustment of a constitution like that of the United States is the occasional failure to coördinate federal powers with state authority, especially in the matter of treaty obligations. All relations with foreign states are entrusted to the Federal Government. To it alone they look for faithful execution of treaties or for reparation and indemnity in case of violation. Foreign governments do not, officially, know the various states of the Union as states; all they are concerned with is the political entity, "the United States." On the other hand, for the great purposes of national life, such as civil and criminal law, social relations, landholding, and so on, the states are supreme—the federal authority does not control them. Hence the hiatus between the two spheres of power and the delicate situation into which the diplomacy of the United States is sometimes brought by reason of the inability of foreign statesmen to understand or to appreciate the working of a federal system of government.

A notable instance of this difficulty is the diplomatic disagreement that arose out of the affair at New Orleans, March 14, 1891, when eleven persons of Italian origin, some of them Italian subjects, were taken from prison and lynched by a mob, without any apparent efforts on the part of the local authorities to give protection. The mob included many prominent citizens and was variously estimated at from 6,000 to 8,000 in number. "In fact,"

said the report of the grand jury, "the act seemed to involve the entire people of the parish and city of New Orleans."

It would seem that, for a quarter of a century preceding, there had been in New Orleans a long series of assassinations which had been attributed to the machinations of Italian secret societies. These had culminated in the murder of the chief of police on the night of October 15, 1890, and for this crime a number of Italians were arrested. While they were in prison awaiting trial, their treatment was the subject of diplomatic complaint on the part of the Italian Minister at Washington, but on the representation of Mr. Blaine, the Secretary of State, the Governor of Louisiana took steps to punish offending prison officials, at the same time assuring Mr. Blaine that "the nationality of the prisoners had nothing whatever to do with the outrages committed upon them."

The conduct of the trial was under suspicion from the first; but public feeling became thoroughly incensed when, on March 13, the jury reported three of the prisoners not guilty and in the case of three others announced its inability to agree upon a verdict. In the belief that there had been a failure of justice, a call was issued to the citizens to vindicate the law, and next morning, in response to the call, several thousand began to assemble in one of the public squares. Anticipating danger, the Italian Consul asked the governor to send troops to protect the prisoners, but the latter pleaded that he was powerless to act without request of the mayor, who at the time could not be found. Before any further action could be taken by the consul, the mob proceeded to the prison where the accused were confined, and shot to death eleven of them, including the six upon whose cases the jury had made report.

Immediately upon receipt of the news of the massacre, the Marquis Rudini, Italian Minister of Foreign Affairs, instructed Baron Fava, the Italian Minister at Washington, "to denounce immediately to the United States Government the atrocious deed of New Orleans, requesting immediate and energetic steps to repress, to protect the Italian colony endangered, and to punish severely the guilty;" and next day, confirming his telegram of March 14, he authorized Baron Fava, in the event of any agitation, "to present a formal protest, with the reserve of asking later

the satisfaction to which we are entitled." Baron Fava interviewed Mr. Blaine in the sense of his instructions and made emphatic protest against "the unjustifiable conduct of the local authorities, who . . . maintained a purely passive attitude while the massacre of the Italians was going on in the prison."

As soon as the protest had been received, Mr. Blaine sent a communication to the Governor of Louisiana, reminding him that the Treaty of 1871 with Italy guaranteed reciprocal protection of person and property and expressing the hope of the President that he would coöperate with him "in maintaining the obligations of the United States towards the Italian subjects who may be within the perils of the present excitement . . . and that all offenders against the law may be promptly brought to justice."

Replying on the 21st of March, the governor assured Mr. Blaine of the coöperation asked for and informed him that the matter was under the investigation of the grand jury. He added that only two or three of the victims were Italian subjects. Baron Fava admitted that his representations had nothing to do with any who were American citizens, but he was all the more insistent that those responsible for the murder of persons under the protection of Italy be brought to justice.

But public opinion in Italy was becoming restive at the delay and this impatience was reflected in the action of the Italian Government, which, according to the American Minister at Rome, was taking "a course more extreme than would otherwise perhaps be adopted." On March 24 Marquis Rudini telegraphed Baron Fava as follows:

"Our requests to the Federal Government are very simple. Some Italian subjects, acquitted by the American magistrates, have been murdered in prison while under the immediate protection of the authorities. Our right, therefore, to demand and obtain the punishment of the murderers and an indemnity for the victims is unquestionable. I wish to add that the public opinion in Italy is justly impatient, and, if concrete provisions are not at once taken, I should find myself in the painful necessity of showing openly our dissatisfaction by recalling the minister of His Majesty from a country where he is unable to obtain justice." This was followed next day by another cablegram from Rudini,

in which he stated that an immediate solution was indispensable. Baron Fava promptly communicated these views to Mr. Blaine and requested a reply without further delay. Not having received one by March 31, the Italian Minister on that day addressed Mr. Blaine, in part, as follows:

" . . . The reparation demanded by the Government of the King, as I have had the honor to inform you in our interviews held during the last few days, was to consist of the following points:

"(1) The official assurance by the Federal Government that the guilty parties should be brought to trial.

"(2) The recognition, in principle, that an indemnity is due to the relatives of the victims.

"Your Excellency was pleased to declare to me that, as the Federal Government did not think it could take this view of the case, it declined to take the two aforesaid demands into consideration.

"Under the circumstances, the Government of His Majesty, considering that the legitimate action of the King's Minister at Washington becomes inefficacious, has ordered me to take my departure on leave. . . ."

On the minister's departure, the business of the legation was left in the hands of the Marquis Imperiali, to whom, on April 1, Mr. Blaine addressed his note in reply. After commenting upon the change of phrase in the first demand, but assuming that the same thing was meant, viz., the punishment of the murderers, Mr. Blaine again pointed out that the Government of the United States, "so far from refusing, has distinctly recognized the principle of indemnity to those Italian subjects who may have been wronged by a violation of the rights secured to them under the treaty with the United States concluded February 26, 1871." In conclusion, Mr. Blaine gave assurance that investigation would be thorough but not hurried; nor would the Government of the United States "make answer to any demand until every fact essential to a correct judgment shall have been fully ascertained through legal authority."

One of the reasons for Mr. Blaine's delay had been his desire to ascertain whether or not the Italian Government was cognizant of the dual character of the American system of government.

On March 31, the very day Baron Fava had left Washington, Mr. Porter, the American Minister at Rome, called at the Italian Foreign Office and, in a conversation with the Under-Secretary, found that there was no misunderstanding as to the interrelation of state and federal powers, but that there was widespread suspicion that the Government of the United States was not acting with sufficient promptitude. Mr. Porter pointed out that, "as the Federal Government could not exercise direct authority over state courts, its proceedings could not be as prompt as might be thought desirable," but he expressed confidence that all treaty obligations would be fulfilled, and added that, in other cases of a similar nature, "where a seeming slowness in accomplishing what was desired had occasioned temporary impatience, the end had fully vindicated the good faith of the government and had removed dissatisfaction."

Mr. Blaine's note of April 1 was answered next day. The Government of Italy disclaimed any demand for punishment apart from due legal process, but insisted that judicial proceedings be instituted at once. Satisfaction was also expressed that the Federal Government recognized "that an indemnity is due to the families of the victims in virtue of the treaty in force between the two countries."

Mr. Blaine made no further reply until April 14, when, in a note of some length, he discussed the constitutional difficulties involved and the measure of a government's responsibilities in the case of mob violence. But first of all he demurred to the construction placed upon his note of April 1; he had not stated that an indemnity was due in virtue of the treaty; what he did say was, that the United States had recognized "the principle of indemnity to those Italian subjects who may have been wronged by a violation of treaty rights," but that it was yet to be established whether the treaty had been violated. Ordinarily, reparation for mob violence is to be sought in the courts, which are open to citizen and resident alien alike, except that the latter has the additional privilege of seeking judicial remedy in the federal courts. But no claim for indemnity can be made against the government unless the authorities of the government can be shown to have been in collusion with the mob or grossly remiss in their



duty. "No government," said Mr. Blaine, "is able, however high its civilization, . . . however prompt and inflexible its criminal administration, to secure its own citizens against violence promoted by individual malice or by sudden popular tumult. . . . Foreign residents are not made a favored class. . . . The foreign resident must be content . . . to share the same redress that is offered by the law to the citizen, and has no just cause of complaint or right to ask the interposition of his country if the courts are equally open to him for the redress of his injuries."

However, Mr. Blaine admitted that the circumstances of the massacre at New Orleans conformed, in all probability, to the exception stated, namely, that the officials had been in connivance with the mob. He stated that the facts were still under investigation by the Attorney-General, who had been asked for an opinion as to whether the Federal Government could maintain a criminal prosecution against the murderers. Should it appear that the State of Louisiana alone could act, the President, it was pointed out, could "do no more than to urge upon the state officers the duty of promptly bringing the offenders to trial." Failing action on the part of the state courts, the United States would then feel it incumbent upon itself to find other means of redress, and the President "would, under such circumstances, feel that a case was established that should be submitted to the consideration of Congress with a view to the relief of the families of the Italian subjects who had lost their lives by lawless violence."

But the misunderstanding persisted in spite of these assurances. The Italian Government admitted that the payment of indemnity was conditional upon proof of the violation of the treaty, but in their opinion, such proof was complete: "Italian subjects acquitted by American juries were massacred in prisons of the State without measures being taken to defend them." "We have affirmed," added Marquis Rudini, "and we again affirm our right. Let the Federal Government reflect upon its side if it is expedient to leave to the mercy of each state of the Union, irresponsible to foreign countries, the efficiency of treaties pledging its faith and honor to entire nations."

On May 5, the grand jury of the District Court of New Orleans reported that, in the matter of the New Orleans massacre, "the

thorough examination of the subject has failed to disclose the necessary facts to justify the grand jury in presenting indictments." Thus, in view of the necessity for legal process in the punishment of crime as well as of the independence of the states in criminal jurisdiction, the Federal Government was powerless to bring the guilty parties to trial.

Nothing further had been done toward a settlement, when, in his annual message of December 9, 1891, the President called the attention of Congress to the unfortunate diplomatic situation in which the government found itself. "The federal officers and courts," he said, "have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers." In his opinion, therefore, "the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as federal agents as to make this government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights." As a permanent safeguard against similar situations in future, he held it to be within the competence of Congress "to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts."

Though no steps were taken to enact any general remedial legislation, the diplomatic incident with Italy was closed, when, on April 12, 1892, Mr. Blaine, under instructions from the President, offered, and the Government of Italy accepted, an indemnity of 125,000 francs "without prejudice to the judicial steps which it may be proper for the parties to take." Thereupon, the Italian Minister returned to Washington and diplomatic relations were fully resumed.

*(Foreign Relations of the United States, 1891, pp. 658-728.)*

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#### CONNELL'S CASE (1888)

WITH regard to the complaint of E. R. Connell, a citizen of the United States residing at Batavia, as agent for an American house,

that he was subjected to compulsory semiweekly drills, which greatly interfered with his business duties, the American Minister at The Hague was instructed as follows:

"It is desirable in the first place to point out that . . . neither Mr. Connell nor this Department has questioned his treatment as being exceptional in any way or as being different from what was required by the local law of Batavia.

"The question presented by Mr. Connell and by this Department for the consideration of the Netherlands Government is whether or not the existence of such a local law is justifiable under international usage. . . .

"It appears that the 'schuttery' is a local corps in which all residents of Batavia, whether the subjects of the Netherlands Government or not, are compulsorily enrolled, and that that guard may be called upon to take part not only in the defense of Batavia, but also in expeditions to repress disorder in neighboring provinces.

"It is well settled by international law that foreigners temporarily resident in a country cannot be compelled to enter into its permanent military service.<sup>1</sup> It is true that in times of social disturbance or of invasion their services in police or home guards may be exacted, and that they may be required to take up arms to help in the defense of their place of residence against the invasion of savages, pirates, etc., as a means of warding off some great public calamity by which all would suffer indiscriminately. The test in each case, as to whether a foreigner can properly be enrolled against his will, is that of necessity. Unless social order and immunity from attack by uncivilized tribes cannot be secured except through the enrollment of such a force, a nation has no right to call upon foreigners for assistance against their will.

"There is no evidence in the possession of this Department tending to show that the condition of affairs at Batavia is such as to bring the question within the fair meaning of the rule as I have stated it, . . . and, short of some such condition of affairs as this, it is the belief of this government that the general principles

<sup>1</sup> With regard to the duration of his residence at Batavia, Mr. Connell said: "I do not pretend to be a temporary resident only, my expectation being to remain here for an extended period."

of international law would not warrant the Netherlands Government in resorting to so extreme a measure.

"The Government of the United States has always favored the residence of its citizens abroad for commercial purposes connected with this country. Such a residence is conducive to the interests not only of the United States, but also of the country in which such agents may temporarily reside.

"Although the right of the Dutch Government to expel foreigners from their control cannot be disputed, the Government of the United States cannot but regard it as a somewhat inhospitable manner of dealing with strangers who reside in the Dutch provinces for the purpose of commerce to insist as a condition of their residence that they shall endure compulsory military service, which may, under some circumstances, become extremely dangerous and onerous.

"You may bring this matter verbally to the attention of the Minister of Foreign Affairs, and explain to him in a frank and friendly manner the views expressed in this instruction and impress upon him that we do not regard the position of Mr. Connell as in any way exceptional."

The American Minister at The Hague replied March 3, 1888:

"After having carefully considered your instruction, I called upon the Minister of Foreign Affairs and presented to him verbally and in a frank and friendly manner the views expressed by you.

"The Minister of Foreign Affairs said that in his opinion and in the opinion of his government there was nothing in the law or its operation which in any way conflicted with international usage, and that it would not therefore be possible for him to enter into any investigation of the law or its operation with a view to its modification.

"His Excellency urged that the services exacted were simply of a police nature for mutual protection, and as the organization had never at any time been mobilized or mustered into the regular military service of the country, or such an event contemplated, such an emergency could not be discussed.

"His Excellency did not contend that the remoteness of the colony from the home government prevented it from being com-

pletely administered within the range of international law, nor did His Excellency intimate that the disturbed state of affairs in Atcheen had in any way affected the condition of affairs at Batavia.

"Without citing any circumstance or condition in justification of the provisions of the law, His Excellency concluded by saying that a similar law existed in the Netherlands, and that such laws were regarded by this government as necessary, and not in conflict with international usage.

"In my opinion there is no excuse for the contention that it is a case of necessity.

"The whole Dutch schuttery system is only machinery for effecting a saving of national expenditure, and has no positive value for the government beyond its economical features.

"It further seems to me not only illogical, but absolutely irrational, for this government, while providing that citizenship must be vacated by Dutch subjects who render foreign military service without the consent of this government, to resolutely insist upon considering all foreign residents within its jurisdiction as liable to compulsory military service."

On March 26, 1888, the Department of State made reply as follows: "Your observations on the Dutch Minister's views point out very clearly the anomaly in the Dutch practice, but as Mr. Connell has withdrawn the basis of our complaint, the Department, while not assenting to the position of the Dutch Government as to the principle involved, is willing that the question may rest until another case revives it."

(Moore: *Digest of International Law*, vol. iv, pp. 61-63.)

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### THE CASE OF MRS. HONEY (1887)

IN 1887 the city authorities of Frankfort-on-the-Main sought to levy an income tax on Mrs. Samuel R. Honey, the wife of a citizen of the United States. It appeared that Mrs. Honey was making an extended but temporary sojourn at Frankfort with her daughter, who was attending the school of music, and that she received a monthly allowance from her husband to defray her own and her daughter's expenses. Under the circumstances the

authorities came to the conclusion that she was not subject to the tax, but proceeded to levy an income tax on Mr. Honey, on the theory that, as his wife and daughter occupied a dwelling there, he had a domicile at Frankfort. It appeared that Mrs. Honey rented furnished rooms, and that all the furniture in them belonged to the landlord. Mr. Honey was a citizen of the United States and was domiciled at Newport, Rhode Island, where he pursued the profession of the law. He stated that the money which he sent to his wife was derived almost exclusively from the proceeds of his professional income, and that she had no income or estate of her own. Mr. Honey had never resided in Germany and had no property, business, or income there. It appeared that in September, 1887, the Prussian authorities also sought to levy a state income tax upon Mr. Honey. These levies were the subject of discussion between the Consul-General of the United States at Frankfort-on-the-Main and the local authorities, and the matter was ultimately communicated by the legation of the United States at Berlin to the German Foreign Office, in order that it might be laid before the Prussian Minister of Finance. The Prussian Minister of Finance subsequently directed that the assessment of the state income tax should be discontinued and the amount already paid refunded. A similar conclusion was reached in regard to the communal tax.

(Taken textually from Moore: *Digest of International Law*, vol. II, pp. 60-61.)

## CHAPTER VI

### THE REGULATION OF COMMERCE, TRAVEL, AND SOJOURN

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#### § 30. REGULATION OF IMMIGRATION AND SOJOURN

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##### THE CASE OF CHARALAMBIS (1903)

SOTIRIOS S. LONTOS CHARALAMBIS, a Greek subject, arrived at New York, May 6, 1903, as a first-cabin passenger on the steamer *Trave*. Questioned by the immigration officials, he stated that he expected to act as chief accountant for the Greek Currant Company (a Greek corporation), at a salary of one thousand dollars a year, in a branch which was to be established in the United States. He was ordered to be deported as a contract laborer. On a rehearing, before a special board of inquiry, it appeared that Lontos was a cousin of the chairman of the directors of the Greek Currant Company and a nephew of the president of the National Bank of Greece, who was the largest stockholder in the company; that, by reason of these facts, his position was peculiarly confidential and representative; and that he was also to make a special study of the banking business in the United States. The chairman of the special board expressed the view that the contract-labor law did not apply to such a case, but this view did not prevail and the order of deportation was reaffirmed. The Secretary of the Treasury on appeal, May 29, affirmed this decision, and the Acting Secretary, on June 2, refused a rehearing. On the next day the writ of *habeas corpus* was obtained, Lontos remaining in the custody of his counsel. The court, however, declined to review the decision of the special board, and an appeal was then taken to the Supreme Court. Meanwhile, the Greek Government had strongly and repeatedly protested. In January, 1905, after the

case was placed on the day calendar of the Supreme Court, Mr. Hayes agreed to move for a dismissal of the appeal, on an assurance from the Department of Justice that his client would be admitted. An order of admission was made by the Secretary of Commerce and Labor, January 21, 1905. The appeal was dismissed. (196 U.S. 643.) The proposed agency of the Greek Currant Company was established in New York, and has been conducting, as Mr. Hayes states, a large and successful wholesale business.

(Extract from Moore: *Digest of International Law*, vol. iv, pp. 179-80.)

### THE CASE OF ROUSSEL (1909)

#### *The French Ambassador to the Secretary of State*

[Translation]

FRENCH EMBASSY,  
Washington, November 27, 1909.

*Mr. Secretary of State:* I have the honor to draw Your Excellency's kind attention to the situation of a young Frenchman, Mr. Charles Roussel, who arrived on the steamship *Caroline*, of the Compagnie Générale Transatlantique, on the 18th instant and was denied admission into the United States by the Immigration Service.

The young man formerly lived at Providence, Rhode Island, with his parents. Having returned to France to perform his military service, as required by law, he was discharged from the ranks on account of his weak constitution and came back to the United States, his traveling expenses being, under the regulation, paid both ways by the Ministry of War of the Republic.

The Consul-General of France at New York, hearing that Roussel was detained at Ellis Island, wrote to Mr. Williams, Commissioner of Immigration, to tell him how the young man was situated and inform him that the consulate-general was ready to pay his way to Providence. Mr. Lanel, who was then advised that Mr. Roussel was excluded on account of his weak constitution and was about to be sent back to France, immediately wrote again to the commissioner to ask that his deportation be deferred.



This young man's case is all the more interesting as he has no relations in France, and his parents reside in Providence. I venture to hope that, taking this situation into account, Your Excellency will kindly use your good offices with the proper department in behalf of my fellow countryman, who, if the decision of the Immigration Service were maintained, would find himself separated, resourceless, from his people, for performing his duty and obeying the laws of the Republic.

Be pleased, etc.,

JUSSERAND.

*The French Ambassador to the Secretary of State*

[Translation]

FRENCH EMBASSY,  
Washington, November 29, 1909.

*Mr. Secretary of State:* Our consuls in the United States report to me that for some time past the Federal Immigration Service has been opposing difficulties to French soldiers, who have been released from the military service after its completion and return to their homes in the United States. Unless provided with a sum of two hundred and fifty francs, they are detained and threatened with deportation to France.

I venture to bring Your Excellency's notice to the fact that, in the first place, the persons concerned were residents of the United States before going to France to perform their military service, and, in the second place, our consuls are required by law to pay the way of these young men to their residence in the United States, no matter how distant it may be.

I should be very thankful to Your Excellency if you would kindly draw to this situation the favorable attention of the proper federal authorities, with the remark that it could hardly be consistent with law and logic to consider returning foreigners, who resided in the United States before going to their country there to perform their military service out of a sense of duty, as immigrants, and treat them as though they had not already been admitted, once for all, to residence in this country.

Be pleased, etc.,

JUSSERAND.

*The French Ambassador to the Secretary of State*

[Translation]

FRENCH EMBASSY,  
Washington, December 14, 1909.

*Mr. Secretary of State:* Your Excellency was so good as to advise me, in your letter of the 7th instant, that you had forwarded to the Department of Commerce and Labor my request on behalf of a young Frenchman, Charles Roussel, whom the authorities of the Immigration Service will not allow to land in New York.

I have just been informed that the said authorities have sent the young man back to France without waiting for the outcome of my request. My government will surely be extremely sorry to hear of this decision. . . .

Your Excellency will surely consider these provisions which may work so much hardship, and to which I took the liberty of drawing your attention in a second letter, dated November 29, to be inconsistent with the true intent of the legislator. I should be very thankful to you if you would acquaint me with your views in this respect and let me know whether the law really is that an alien once admitted in the United States may thereafter be excluded if he leaves the country, even for the performance of a duty held to be sacred the world over and if his health becomes impaired.

Be pleased to accept, etc.,

JUSSERAND.

*The Acting Secretary of State to the French Ambassador*DEPARTMENT OF STATE,  
Washington, December 21, 1909.

*Excellency:* In further reply to Your Excellency's note of the 27th ultimo, and with reference also to your note of the 14th instant, in regard to the case of one Charles Roussel, a French citizen, who recently returned to this country, but was denied admission, notwithstanding the fact that he had certain interests here, I have now the honor to advise you of the result of this Department's communication to the Department of Commerce and Labor of Your Excellency's note of November 27.

It appears that this case came before the Department of Com-

merce and Labor in connection with an application for admission under bond, on November 24, 1909. A medical certificate was rendered showing Mr. Roussel to be afflicted with "chronic inflammation connective tissue neck with suppuration and sinus, which affects ability to earn a living." It further appears from the statement made by the Acting Secretary of Commerce and Labor, that the passage of this alien was paid by the French Government pursuant to a statute calling for such payment when a native of France returns thither for military service. Mr. Roussel was totally destitute of money and, although his father appeared as a witness in his behalf, evidence was not submitted to overcome the presumption of his likelihood to become a public charge. Consequently, the application was denied and the applicant was deported.

I may add that the Third Assistant Secretary of State, in consultation with the Acting Secretary of Commerce and Labor, orally pointed out that this case seemed to be one involving particular hardship. The Acting Secretary of Commerce and Labor could, however, only reiterate the statement made in his correspondence with this Department, that under the law an alien returning to this country must be subjected to the same treatment as that attending his initial immigration. The Department regrets that, in view of the provisions of law applying in such cases, no other course was open to the Department of Commerce and Labor than to order the deportation of Roussel.

I have also the honor in this relation to refer to Your Excellency's note of November 29 last, wherein you discussed the general subject of French citizens who have emigrated to the United States and later returned to their homes in France for the purpose of performing military duty, upon the conclusion of which they again emigrated to the United States. Your Excellency is of opinion that, in such event, they should be admitted without question.

Your Excellency's note was communicated to the Secretary of Commerce and Labor, who, with reference to the comments made therein, advises me as follows:

A reference to the act of February 20, 1907, will indicate that the administrative officers of the Immigration Service have no

authority to waive the examination of arriving aliens upon discovery of the existence of such a state of facts as set forth in Your Excellency's note of November 29.

With respect to your contention that the first admission of an alien to the United States is conclusive as to his right to remain in this country and to return hither after an absence abroad without being subject to the immigration laws, the Department of Commerce and Labor points out that this impression is an erroneous one, inasmuch as an alien regularly admitted may be arrested and deported at any time within three years subsequent, if found to have entered in violation of law or to be a public charge from causes existing prior to landing. Moreover, it is added, an alien resident of this country, who goes abroad for any purpose, is subject to the immigration laws upon his return. The fact of previous residence here, while it might be deemed a factor to assist in the determination of his right to land, is by no means conclusive as to the existence of such right. Indeed, it appears that the only persons exempt from the requirements of the immigration laws are *bona-fide* American citizens and the diplomatic and consular officers of foreign countries, their suites, families, and guests.

Accept, etc.,

HUNTINGTON WILSON.

(*Foreign Relations of the United States, 1909*, pp. 260-63).

### THE CASE OF ALFRED LUMB (1910)

#### *The Acting Secretary of State to Ambassador Reid*

[Telegram — Paraphrase]

DEPARTMENT OF STATE,  
Washington, March 12, 1910.

MR. WILSON instructs Mr. Reid to consult Consul-General Griffiths regarding reported deportation of Alfred Lumb, a British subject convicted in England of counterfeiting, to the United States; to make careful investigation, and, if facts are found to be as reported by Mr. Griffiths, and, if order of deportation to the United States has been issued, to bring the matter to the attention of the British Foreign Office, calling attention to section 2 of

Immigration Act of February 20, 1907, 34 Statutes at Large, 898. Mr. Reid is informed that the attitude of this Government regarding compulsory or assisted emigration is set forth in 4 Moore's *Int. L. Dig.* sections 560 and 565, and he is directed to inform the British Government of this attitude, and to say that the Government of the United States feels confident that when the action of the local officers at Leeds has been called to the attention of the British Government steps will be taken to prevent the consummation of the order of deportation.

*Ambassador Reid to the Secretary of State*

AMERICAN EMBASSY,  
London, March 18, 1910.

*Sir:* On receipt of your cable instruction of the 13th instant I immediately took steps to investigate whether the commissioner of assize at Leeds had taken the course reported to you through the American Consul-General in London.

The first information which I received from the consul at Leeds, which was confirmed by the press reports, led me to believe that the commissioner of assize had merely withheld sentence on the ground that Alfred Lumb should leave the country within a certain period and that the court itself had made no reference to the prisoner's going to the United States.

On receipt, however, of a copy of the transcript of the court records it became evident that the commissioner, in addressing the prisoner, said, "Are you ready, if I let you go, to be bound over to go to America?" to which the prisoner replied, "Yes," and thereupon the commissioner stated that he was prepared to release prisoner on his recognizance and his brother's for the sum of £50 each.

I have accordingly to-day addressed a note to the Foreign Office in which, after bringing the facts to the attention of Sir Edward Grey, I request him to take such steps as may be necessary to prevent the consummation of the order.

I have, etc.,

WHITELAW REID.

[Enclosure]

*Ambassador Reid to the Minister for Foreign Affairs*

AMERICAN EMBASSY.

London, March 16, 1910.

*Sir:* My attention has been called to reports published in the *Yorkshire Evening Post* of the 8th and 9th instant to the effect that one Alfred Lumb, a British subject, has been indicted for uttering counterfeit coin and for silvering with a certain liquid pennies and a halfpenny so that they would resemble current silver coins, to which indictment the prisoner pleaded guilty.

It appears that having asked prisoner whether in the event of his discharge being granted he would be ready to be bound over to leave the country and to go to America, and the prisoner having answered in the affirmative, the commissioner announced that prisoner would be released upon entering into a recognizance of £50 to leave the country within one month, the prisoner's brother entering into a like recognizance that the prisoner would go within the stated period.

If the reports that have appeared in the *Yorkshire Evening Post* are not incorrect, it would appear that the commissioner of assize was unaware of the provisions of the United States Immigration Act of 1875, section 3, providing that "it shall be unlawful for aliens of the following classes, namely, . . . whose sentence has been remitted on condition of their emigration" — this provision being intended to put a stop to a practice in certain countries, whereby, on sending such persons to the United States, the authorities were able to avoid the trouble and expense of taking care of their own criminals.

The Immigration Act of February 22, 1907, provides that persons *inter alios* who have been convicted of or admit having committed a felony shall be excluded from admission to the United States. Lumb would, therefore, if his identity were discovered, not only be denied admission, but would, on his arrival, be deported.

In bringing the matter to your attention, I wish to point out, in order to avoid similar cases in the future, what will, I think, have occurred to you, that the commissioner of assize, in post-

poning a sentence upon the express condition that the prisoner should go to America, was unwittingly violating international comity, in requiring by his sentence that the prisoner before him should attempt to violate the laws of the United States.

My government feels confident that if the facts of the case prove to be as stated you will take such steps as may be necessary to prevent the consummation of the commissioner's order.

I have, etc.,

WHITELAW REID.

[On June 22 Mr. Reid enclosed to the Secretary of State at Washington a note dated June 17 which he had received from the British Foreign Office:]

*The Minister for Foreign Affairs to Ambassador Reid*

FOREIGN OFFICE,  
London, June 17, 1910.

*Your Excellency:* I did not fail to refer to the proper department of His Majesty's Government the note which Your Excellency addressed to me on the 16th of March last, respecting the case of Alfred Lumb, a British subject, who was recently convicted of uttering counterfeit coin and was released on condition of leaving the United Kingdom and proceeding to the United States, and I now have the honor to inform Your Excellency that the commissioner of assize who heard the case acted in the matter in ignorance of the United States statutes bearing upon the immigration of convicted offenders.

With the object of avoiding any possible recurrence of such a case the Secretary of State for the Home Department has addressed to all judges of the high court, recorders of boroughs, and chairmen of quarter sessions, a circular calling their attention to the provisions of United States law on this subject.

I have, etc.,

(For Sir E. Grey):  
W. LANGLEY.

(*Foreign Relations of the United States, 1910, pp. 593-97.*)

## § 31. EXPULSION

## THE CASE OF BEN TILLET (1896)

BEN TILLET, a British subject, arrived at Antwerp on August 20, 1896, for the purpose of effecting an international federation and strike of the dock laborers. He was arrested and after a detention of twenty-six hours was placed on board a vessel returning to England. The British Government protested against his expulsion. After a diplomatic interchange in which the governments could reach no agreement, it was agreed by a convention of March 19, 1898, to submit the question to a foreign jurist for arbitration. Article 2 of the *compromis* (agreement for arbitration) defined the competence of the arbitrator as follows: "It shall be the duty of the arbitrator to consider whether the claim for a pecuniary indemnity, advanced by Her Majesty's Government on behalf of Mr. Ben Tillett, is well founded, and, if so, to determine the amount of such indemnity."

M. Desjardins, who had received an invitation from the two governments to act as arbitrator, rendered his decision as follows:

"In discharge of the functions of arbitrator conferred on me, with the authority of the French Government, by virtue of the Convention of the 19th March, 1898, concluded between the Government of His Majesty the King of the Belgians and the Government of Her Britannic Majesty, on the subject of the international dispute occasioned by the expulsion of Mr. Ben Tillett, a British subject, from Belgian territory;

"Having carefully examined and maturely weighed the documents that have been produced on either side concerning the indemnity claimed by the Government of Her Britannic Majesty from the Government of His Majesty the King of the Belgians on behalf of Mr. Ben Tillett;

"Having, moreover, proceeded to Antwerp on the 15th August, 1898, in order, by means of a full knowledge of the case, to solve certain questions which seemed doubtful to me, and having held an inquiry in the Antwerp prison itself;

"I pronounce the following award of arbitration:



"(A.) On the right of expulsion from the point of view of principle:

"Whereas the right of a state to exclude from its territory foreigners when their dealings or presence appears to compromise its security, cannot be contested;

"Whereas, moreover, the state in the plenitude of its sovereignty judges the scope of the acts which lead to this prohibition;

"(B.) As to the watch kept on the person of Ben Tillett in consequence of the meeting of the 21st August, 1896, and up to the confinement of this British subject in the lock-up at Antwerp:

"Whereas, if the right of the state to expel be recognized, the means of insuring the execution of its injunctions in that regard cannot be denied to it;

"Whereas the state should have the power to keep a watch on foreigners whose presence seems dangerous to public order, and, if it fears lest those to whom it forbids its territory should escape this vigilance, it may keep them in view;

"Whereas, in fact, Ben Tillett repaired to Belgium to organize the international federation of dockers there, and to foment a strike which was considered by the Royal Government to be at once prejudicial to the interests of the port of Antwerp and dangerous to the public tranquillity;

"Whereas the Belgian Government had plausible reasons for thinking that Ben Tillett had already harangued the dock laborers at the 'Werker' Club on the evening of the 22d July, 1896, and, after this speech, had cleverly eluded the search of the police;

"Whereas that government did not overstep its functions or exceed its right in endeavoring not to lose sight of Ben Tillett on the afternoon of the 21st August, and in subsequently securing his person after the meeting held in the courtyard of Schram's Inn;

"Whereas no measure of expulsion had, it is true, yet been taken against Ben Tillett at the time of his being conducted to the police station about 4 o'clock in the afternoon of the 21st August, 1896; but whereas the ministerial dispatch of the 9th July, 1896 (referred to in the requisition of the commissary of police of Antwerp, fifth southern section, dated the 21st August), relative to foreign-

ers arriving at Antwerp for the purpose of holding meetings there on behalf of a universal union of sailors and dock laborers, left no doubt as to the wishes of the central power; and whereas the Antwerp police could not, without disobeying these instructions, fail to detain, on behalf of the government, foreigners who came to take an active part in the agitation set on foot since June, 1896, for the organization of the international federation;

"Whereas, moreover, according to the papers produced in the case, and, in particular, a report of the Assistant Commissary Bucan, dated the 31st August, 1896, Ben Tillett had been formally advised of the instructions given by the Minister; whereas, according to the deposition of the aforesaid Bucan, taken by me on oath on the 15th August, 1898, Ben Tillett knew perfectly well what he had to expect; he had been officially informed, directly he had landed, that if he meant to hold the public meeting loudly announced in the *Seamen's Chronicle* of the 8th August, 1896, 'he must quit Belgian territory; otherwise he would render himself liable to be arrested and conducted under escort to the frontier;'

"Whereas, in this condition of things, the agents of the executive were entitled to detain Ben Tillett at the police station rather more than three hours, with a view to insuring the execution of a measure of expulsion which had been decreed in principle by the government in council, and which was shortly to become an accomplished fact;

"Whereas decrees of expulsion do not generally precede the events which call for them, and whereas, if forcible means may not be employed to hold in safe-keeping for a few hours a foreigner whose conduct has become a cause of trouble, until this measure is officially taken, this person will have time to evade the police, and the Government will find itself powerless;

"(C.) On the imprisonment in a lock-up:

"Whereas the British Government reproach the Belgian authorities with having taken Ben Tillett from the police station to conduct him to a prison, where he found himself mixed up with men under sentence for, or accused of, common law offenses;

"Whereas, as a matter of fact, Ben Tillett was entered in the books at the Antwerp lock-up at 8 o'clock in the evening of the

21st August, 1896, in order, according to the requisition of the 21st August, 1896, to be 'kept at the disposal of the gendarmerie,' and thence 'conducted out of the kingdom;'

"Whereas the Belgian authorities undoubtedly conformed to the rule of this penitentiary establishment, according to which the lock-up is intended not only for accused persons, but also for 'foreigners detained on behalf of the Administrator of Public Safety, and for those whose extradition is demanded by foreign governments;<sup>1</sup> and whereas the sole question at issue is whether the Royal Government has not infringed an obligation of international propriety in imprisoning Ben Tillett in quarters simultaneously devoted to these different classes of prisoners;

"But whereas, in fact, on the one hand, Ben Tillett was confined in two cells of this building successively;

"And whereas in law, on the other hand, it is impossible to compel a sovereign state either to construct special establishments exclusively designed for the provisional detention of foreigners between the time of their arrest and the moment when the measure of expulsion can be carried out, or even to reserve them special quarters in houses already constructed; whereas the Belgian Government satisfied the exigencies of international courtesy by isolating Ben Tillett, and thereby preventing him from coming into contact with persons awaiting their trial;

"(D.) On the duration of the whole detention:

"Whereas, in fact, Ben Tillett, having been entered in the books of the Antwerp prison at 8 o'clock in the evening of the 21st August, was not taken out till 6 o'clock in the evening of the next day, the 22d August, in order to be taken on board the Harwich boat which left for England at 7 o'clock; and whereas twenty-six (? twenty-two) hours thus elapsed from the moment when this English subject was consigned to the police station until the time when he was put in a position to go back to his country;

"But whereas the Belgian Government could not be compelled to send Ben Tillett away by the Harwich boat at 7 P.M. on the 21st August; whereas the Antwerp police had to concert with the government, and consequently communicate with Brussels; and whereas the instructions awaited by the witness Winne, assistant

<sup>1</sup> Article 4 under the general heading: "purposes of the prison."

to the police commissary at Antwerp, heard by us on oath, had not reached him at 7 o'clock;

"Whereas it is impossible to maintain that these instructions ought necessarily to have reached the Antwerp police agents by 7 o'clock, without considering with excessive strictness the manner in which the representatives of the Belgian Government use their time;

"Whereas other boats, it is true, left for England both on the night of the 21st-22d August and in the morning of the 22d August, and whereas the British Government asks in its second memorandum why one of these various means of transport was not made use of;

"But whereas it appears from the documents produced and from the depositions taken by us in the prison at Antwerp on the 15th August, 1898:

"1. That Ben Tillett, when he embarked for Antwerp on the Harwich boat, had taken a return ticket which was available for thirty days.

"2. That, in order to utilize the ticket in question, he intended to make use of the same line of steamers on his return voyage;

"3. That he had expressly informed the witness Winne of his intention of returning by the Harwich boat;

"That under these circumstances the Belgian Government were guilty of no error in sending Ben Tillett on board the Harwich boat at 7 o'clock on the 22d August, this being the earliest time of sailing of that vessel;

"(E.) As to the treatment to which he was exposed in the lock-up:

"Whereas when I was at Antwerp on the 15th August, 1898, I requested M. van Calster, the officer in charge of the lock-up, to have cells 6 and 29 successively occupied by Ben Tillett on the 21st and 22d August opened for my inspection;

"Whereas I found that they were dry, sufficiently ventilated, clean, with no smell; that the beds were sufficiently large; the single blanket on the latter appeared to me to be sufficient for the needs of the persons occupying the cells, in view of the temperature which prevails during the month of August; and it did not appear to me that a stay of twenty-two hours in either of these cells at

that season of the year could possibly endanger the health of a person detained in them;

"Whereas cells 6 and 29 might have been tampered with, in view of my approaching visit, I caused cells 8, 12, and 21 to be opened; and found these three cells to be arranged in the same manner;

"Whereas an official extract from the register of the prison at Antwerp, which was submitted for my inspection, showed that the administration had paid during the first seven months of 1896, 801 days' wages to whitewashers, 259 days' wages to bricklayers, 334 days' wages to painters, 117 days' wages to mattress-stuffers; the lockup being clearly maintained on the same footing in 1896 as it is in 1898;

"Whereas, moreover, Ben Tillett had every facility for obtaining an additional supply of food if the ordinary prison fare appeared to him insufficient in quantity;

"Whereas the director of the prison declared to me very positively on oath that persons detained there and foreigners placed at the disposal of the Administration of Public Safety were never compelled to wear prison dress, except in cases of manifest want of cleanliness and for hygienic reasons; the 81st article of the prison Regulations merely stating that 'the prisoner is to be made to wear the prison dress if he is dirty;' whereas the use even of the hood, according to the Ministerial Circular of August 24, 1891, is not obligatory in the case of persons detained or accused or in the case of persons arrested for debt; and whereas according to the deposition of the witness Gillade, Ben Tillett was not compelled to wear prison dress, in accordance with the provision of article 81 of the Regulations; that, in fact, it is not established that this humiliation was inflicted on him;

"(F.) As to the relation between the detention of Ben Tillett in the prison at Antwerp and the state of his health:

"Whereas there is no ground for supposing that there is a relation of cause and effect between the detention of twenty-two hours and the state of ill-health certified to by two physicians;

"Whereas one of the certificates connects the nervous troubles of which Ben Tillett complains with a state of 'prolonged nervous excitement,' and that this orator did, from the 29th August

and during the whole month of September, carry on a campaign of meetings, with the greatest zeal and activity;

"For these reasons:

"I decide that the demand for compensation put forward by Her Majesty's Government has no basis, and I declare them non-suited;

"I condemn them in costs, in virtue of article 5 of the Convention of the 19th March, 1898, assuming that there are costs to be paid; but at the same time I declare that, as far as I myself am concerned, I make no claim to fees or reimbursement of expenses.

"Done at Paris in duplicate, the 26th December, 1898.

"(Signed)

ARTHUR DESJARDINS,

*"Membre de l'Institut de France et de  
l'Institut de Droit International,  
Avocat Général près la Cour de  
Cassation de France."*

(*Parliamentary Papers* [1899], (46), *Papers relating to the Arbitration in the case of Mr. Alderman Ben Tillett.*)

## PAQUET'S CASE

*Belgian-Venezuelan Mixed Claims Commission, 1903.*

*Filtz*, Umpire:

"The umpire having examined and studied the record, and considering —

"That Mr. N. A. Paquet, a Belgian subject, domiciled in Caracas, claims the sum of 280,000 bolivars for damages, direct and indirect, traveling expenses and hotel expenses, because the Government of Venezuela prevented him from landing at La Guaira;

"That the claim has been reduced by the Belgian Commissioner by the sum of 250,000 bolivars for indirect damages, and insisted upon only for direct damages, estimated at 4,500 bolivars;

"That the right to expel foreigners from or prohibit their entry into the national territory is generally recognized; that each state reserves to itself the exercise of this right with respect to the person of a foreigner if it considers him dangerous to public order, or for considerations of a high political character, but that its application cannot be invoked except to that end;

"That, on the other hand, the general practice among govern-

ments is to give explanations to the government of the person expelled if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation, which is aggravated in the present case by the fact that the attributes of the executive power, according to the Constitution of Venezuela, do not extend to the power to prohibit the entry into the national territory, or expelling therefrom the domiciled foreigners whom the government suspects of being prejudicial to the public order;

"That, besides, the sum demanded does not appear to be exaggerated —

"Decides that this claim of N. A. Paquet is allowed for 4,500 francs."

(*Venezuelan Arbitrations of 1903*, prepared by J. H. Ralston [Washington, 1904], pp. 267-68.)

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## § 32. TARIFF AND THE REGULATION OF IMPORTS

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### GUATEMALAN CUSTOMS LAWS (1875)

COMPLAINT was made by an American firm against the Government of Guatemala for causing some packages of imported merchandise to be opened. "Though the inconvenience to which those gentlemen may have been subjected by that proceeding may," said the Department of State, "be a subject of regret, it is apprehended that exemption from it cannot be claimed on the principle of international law which you suppose may be applicable to the case. In the absence of a treaty, at least, that government may carry into effect its municipal law in regard to importations from abroad in such way as may be deemed necessary for the protection of its revenue. The same right will be exercised here in respect to importations by citizens of Guatemala into the United States."

(Moore: *Digest of International Law*, vol. II, pp. 66-67.)

## INSPECTION OF AMERICAN PORK EXPORTS

IN 1881, and for several years thereafter, the Government of the United States was involved in a diplomatic controversy with the Governments of France and Germany over their action in forbidding the importation into their respective countries of American pork. The prohibition was based on the alleged occurrence of trichinæ in American hogs, but later it was practically avowed to be for the protection of the agricultural interests. One of the French officials in the course of the discussion, while stating that the exclusion was made in the first instance on sanitary grounds, admitted that "the idea of protection to French producers of salt pork may have had its weight in maintaining the prohibition. He personally did not sympathize with the protectionist views . . . but he was sorry to say the tendency of the new Chamber seemed to be strongly in the opposite direction." The American Minister reminded him "that there was a difference between protection and prohibition" and that there was "invidious discrimination in admitting the same class of products from other countries while prohibiting ours." (*Foreign Relations of the United States, 1889*, pp. 166-67.) The prohibition was finally removed by France in 1891 and high tariff duties substituted.

On January 24, 1891, Mr. Phelps, the American Minister at Berlin, reported to his government as follows:

"I have the honor to call your attention to the debate which occupied two sessions of the Reichstag, one on Wednesday, the other on Friday of this week. . . .

"The debate was opened by Dr. Barth. He referred to the origin of this policy of exclusion as so near in time and spirit to Germany's adoption of the protective system that one cannot but draw the inference that it was part of that system; and the probability that the policy of exclusion was one of protection and not of sanitation was used with more or less directness by all who subsequently spoke on his side, and as earnestly and uniformly denied by those who spoke for the government." (*Foreign Relations of the United States, 1891*, pp. 501-02.)

In his correspondence with the German Minister for Foreign Affairs, Mr. Phelps argued strongly against the position taken



by the German Government. "Everybody knows," he said, "that 65,000,000 Americans eat American pork, and that there has not been a case of illness or death reported as occurring from its use. . . . Everybody knows that 35,000,000 Englishmen eat it, and that it is the staple and cheap nourishment of the British laborer, whose health and strength are models for emulation. . . .

"The undersigned is informed that this almost universal testimony met with a single objection: American pork is harmless to Americans and other consumers, because they eat it cooked; is harmful to German consumers, however, because they use it uncooked. In answer to this statement, may it not be urged that 6,000,000 Americans born in Germany or from parents who were born in Germany probably retain to a great extent the tastes and habits of their Fatherland in this particular? Yet it has never been charged that American pork has done them any harm." (*Foreign Relations of the United States, 1891, p. 506.*)

Congress having provided, by the act of March 3, 1891, for the inspection of cattle and hogs, the German Government intimated its intention to accept the act as satisfactory and to repeal the decree excluding American pork. It suggested, however, as consideration, the removal of American duties on German sugar. But the American Government was not willing to negotiate on that basis. "The German Government," it was pointed out, "has persistently adhered to the position that the origin and maintenance of the pork prohibition was based on the absence of, or imperfect, inspection of American pork, which, it was alleged, exposed German consumers to disease. If that government recognizes the sufficiency of the present inspection, it hardly seems reasonable to ask that the United States should purchase the revocation of the prohibition by a promised concession of duties on sugar. The President is disposed to treat with the German Government respecting commercial reciprocity . . . with the greatest spirit of liberality, and the prompt action of that government regarding the pork inspection will have its due weight in determining the terms of the reciprocity arrangement; but it would hardly comport with the past contention of the German Government to make the revocation of the prohibition dependent

upon an act having no relation to it." (*Foreign Relations of the United States, 1891*, p. 511.)

The German decree of exclusion was repealed without conditions on September 3, 1891, and American pork admitted on certification of American inspection.

The grievances of American pork exporters, however, did not cease with the repeal of the prohibition. Microscopical examination was expensive, and in the absence of disease in the United States was felt to be unnecessary. Besides, the additional examination of American pork in Germany was vexatious and easily gave rise to further misunderstanding.

In 1895 the report of the Secretary of Agriculture referred to "the agrarian protectionists of Germany, who have instituted by unjust discriminations every possible impediment to the consumption of pork and beef from the United States in that Empire" and suggested that "reciprocal certification of the chemical purity of wines exported from those countries to the United States may some time be demanded from the German and French Governments as a sanitary shield to American consumers, for certainly American meats are as wholesome as foreign wines." (*House Documents, 54th Cong., 1st Sess. [1895-96], vol. 74, p. 10.*)

In a dispatch of November 20, 1897, Mr. Sherman, Secretary of State, requested Mr. White, the American Minister at Berlin, to make representations on the subject to the German Government, in part, as follows:

"... You will bring the foregoing to the attention of the Minister for Foreign Affairs, at the same time insisting that —

"1. American pork as sent to Germany is practically harmless and certainly far less dangerous than inspected German pork, as is shown by the medical records of Germany.

"2. The discovery of trichinæ in a few pieces of our pork when reexamined abroad cannot be accepted as evidence of inefficient inspection. The numerous cases of trichinosis in man which have occurred in Germany from eating pork inspected there shows the impossibility of discovering all trichinous meat by the first inspection.

"3. As American pork is carefully inspected here before shipment, it is unjust to our shippers to require them to pay the

expense of a second inspection after it arrives in Germany. This expense, together with the damage from unpacking, exposure, and hastily repacking, is a great obstacle to this important branch of our commerce with the German nation." (*Foreign Relations of the United States*, 1897, p. 191.)

In 1898 the American Consul at Cologne, in a report upon trichinæ in Germany, stated that the German inspection of American meats was "much more rigid than the tests for the German home products." He added that "other expedients also appear to be resorted to by self-constituted authorities in order to discourage and prevent the large consumption of American meats. There is now pending before the court at Elberfeld, a town near Cologne, a suit relating to a case of meat from America which was packed in borax. It seems that the municipality of Cologne issued, through the daily papers, a notice or warning to dealers that such meat should not be handled or sold by them, alleging its use to be detrimental to the health of the consumer. Any citizen is permitted under this order to file a complaint regarding this kind of meat. As a consequence, when the *Bürgermeister* [mayor] issues his edict or warning, the dealers in meats are afraid to handle or sell the prohibited products; and this is done in spite of the fact that the Emperor alone has the power to prescribe the manner of packing or preparing human food." (*House Documents*, 55th Cong., 3d Sess. [1898-99], vol. 89, pp. 518-19.)

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### § 33. TRANSIT FACILITIES

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#### PRIVILEGES OF TRANSIT TO CHINESE LABORERS (1882)

THE Attorney-General, in an opinion given to the Secretary of State, December 26, 1882, held that Chinese laborers, in transit across the territory of the United States from one foreign country to another, were neither emigrants nor Chinese coming to the United States as laborers, within the Treaty of November 17, 1880, or the act of May 6, 1882, and further that they were not

required to produce the certificates of identification prescribed by sections 4 and 6 of that act, provided that they established by competent proof their transient status. This opinion was approved by the Department of State and transmitted to the Secretary of the Treasury, who revoked a contrary decision of his Department of July 20, 1882, and adopted on January 23, 1883, regulations permitting Chinese Consuls in the ports of the United States to issue certificates to Chinese laborers arriving in transit. Such a certificate was required wherever there was a resident Chinese Consul, but if there was no such consul, other competent evidence was receivable, such as a through ticket across the territory of the United States, and affidavits.

(Extracts from Moore: *Digest of International Law*, vol. iv, pp. 232-33.)

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#### NAVIGATION OF THE MISSISSIPPI (1792)

THE question of the navigation of the Mississippi was the subject of consideration in the Continental Congress and of negotiation at Madrid during the American Revolution, Spain demanding the recognition of her claim to the exclusive navigation of the river as a necessary condition of aid to the United States in their struggle with Great Britain.

The treaty of peace between the United States and Great Britain of 1782-83 declared (art. 8): "The navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States."

In 1790 the diplomatic representative of the United States at Madrid was instructed to urge upon the Spanish Government the immediate opening of the river.

In a report to the President of March 18, 1792, Mr. Jefferson, as Secretary of State, asserted the right of the United States to the free navigation of the Mississippi within the Spanish dominions on the ground (1) of the Treaty of Paris of 1763, (2) of the treaty of peace with Great Britain of 1782-83, and (3) of "the law of nature and nations," a ground declared to be "still broader and more unquestionable" than either of the others. "The ocean,"

said Mr. Jefferson, "is free to all men, and their rivers to all their inhabitants. . . . Accordingly, in all tracts of country united under the same political society, we find this natural right universally acknowledged and protected by laying the navigable rivers open to all their inhabitants. When their rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream is in any case obstructed, it is an act of force by a stronger society against a weaker, condemned by the judgment of mankind. . . . The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their own citizens, by declaring them public (*flumina publica sunt, hoc est populi Romani*, *Inst.* 2, t. 1, § 2), declared also that the right to the use of the shores was incident to that of the water.

(Extract from Moore: *Digest of International Law*, vol. 1, pp. 623-24.)

## CHAPTER VII

### THE PROTECTION OF NATIONAL INTERESTS ABROAD

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#### § 34. BASIS OF PROTECTION

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##### THE KOSZTA CASE (1853)

To the note of the Austrian Chargé d'Affaires of August 29, 1853, Secretary of State Marcy replied in a note of September 26, 1853, as follows:

"To bring out conspicuously the questions to be passed upon, it seems to the undersigned that the facts should be more fully and clearly stated than they are in Mr. Hülsemann's note.

"Martin Koszta, by birth a Hungarian, and of course an Austrian subject at that time, took an open and active part in the political movement of 1848-49, designed to detach Hungary from the dominion of the Emperor of Austria. At the close of that disastrous revolutionary movement, Koszta, with many others engaged in the same cause, fled from the Austrian dominions, and took refuge in Turkey. The extradition of these fugitives, Koszta among them, was demanded and pressed with great vigor by Austria, but firmly resisted by the Turkish Government. They were, however, confined at Kutahia, but at length released, with the understanding or by express agreement of Austria that they should leave Turkey and go into foreign parts. Most of them, it is believed, before they obtained their release, indicated the United States as the country of their exile. It is alleged that Koszta left Turkey in company with Kossuth — this is believed to be a mistake; and that he engaged never to return — this is regarded as doubtful. To this sentence of banishment — for such is the true character of their expulsion from Turkey — Aus-

tria gave her consent; in truth, it was the result of her efforts to procure their extradition, and was accepted by her as a substitute for it. She had agents or commissioners at Kutahia to attend to their embarkation, and to her the legal consequences of this act are the same as if it had been done directly by herself, and not by the agency of the Ottoman Porte. Koszta came to the United States and selected this country for his future home.

"On the 31st of July, 1852, he made a declaration, under oath, before a proper tribunal, of his intention to become a citizen of the United States and renounce all allegiance to any other state or sovereign.

"After remaining here one year and eleven months, he returned, on account, as is alleged, of private business of a temporary character, to Turkey in an American vessel, claimed the rights of a naturalized American citizen, and offered to place himself under the protection of the United States Consul at Smyrna. The consul at first hesitated to recognize and receive him as such; but afterwards, and sometime before his seizure, he, and the American Chargé d'Affaires *ad interim* at Constantinople, did extend protection to him, and furnished him with a *tezkereh* — a kind of passport or letter of safe-conduct, usually given by foreign consuls in Turkey to persons to whom they extend protection, as by Turkish laws they have a right to do. It is important to observe that there is no exception taken to his conduct after his return to Turkey, and that Austria has not alleged that he was there for any political object, or for any other purpose than the transaction of private business. While waiting, as is alleged, for an opportunity to return to the United States, he was seized by a band of lawless men — freely, perhaps harshly, characterized in the dispatches as 'ruffians,' 'Greek hirelings,' 'robbers' — who had not, nor did they pretend to have, any color of authority emanating from Turkey or Austria, treated with violence and cruelty, and thrown into the sea. Immediately thereafter he was taken up by a boat's crew lying in wait for him, belonging to the Austrian brig-of-war the *Huszar*, forced on board of that vessel, and there confined in irons. It is now avowed, as it was then suspected, that these desperadoes were instigated to this outrage by the Austrian Consul-General at Smyrna; but it is not pretended that he

acted under the civil authority of Turkey, but, on the contrary, it is admitted that, on application to the Turkish Governor at Smyrna, that magistrate refused to grant the Austrian Consul any authority to arrest Koszta.

"The Consul of the United States at Smyrna, as soon as he heard of the seizure of Koszta, and the Chargé d'Affaires of the United States *ad interim* at Constantinople, afterwards interceded with the Turkish authorities, with the Austrian Consul-General at Smyrna, and the commander of the Austrian brig-of-war, for his release, on the ground of his American nationality. To support this claim, Koszta's original certificate of having made, under oath, in a court in New York, a declaration of intention to become an American citizen, was *produced* at Smyrna, and an imperfect copy of it placed in the hands of the Imperial Austrian Internuncio at Constantinople. The application to these officers at Smyrna for his liberation, as well as that of Mr. Brown, our Chargé d'Affaires, to Baron de Bruck, the Austrian Minister at Constantinople, was fruitless, and it became notorious at Smyrna that there was a settled design on the part of the Austrian officials to convey him clandestinely to Trieste — a city within the dominion of the Emperor of Austria. Oppor-  
tunately, the United States sloop-of-war, the *St. Louis*, under the command of Captain Ingraham, arrived in the harbor of Smyrna before this design was executed. The commander of the *St. Louis*, from the representation of the case made to him, felt it to be his duty, as it unquestionably was, to inquire into the validity of Koszta's claim to American protection. He proceeded with deliberation and prudence, and discovered what he considered just grounds for inquiring into Koszta's claim to be discharged on account of his American *nationality*. During the pendency of this inquiry, he received notice of the design to take Koszta clandestinely, before the question at issue was settled, into the dominions of the Emperor of Austria. As there was other evidence of bad faith besides the discovered design of evading the inquiry, Captain Ingraham demanded his release, and intimated that he should resort to force if the demand was not complied with by a certain hour. Fortunately, however, no force was used. An arrangement was made by which the prisoner was delivered into the custody



of the French Consul-General, to be kept by him until the United States and Austria should agree as to the manner of disposing of him. . . .

"His Imperial Majesty demands that the Government of the United States shall direct Koszta to be delivered to him; that it shall disavow the conduct of the American agents in this affair, call them to a severe account, and tender satisfaction proportionate to the outrage.

"In order to arrive at just conclusions, it is necessary to ascertain and clearly define Koszta's political relation with Austria and with the United States when he was seized at Smyrna. This is the first point which naturally presents itself for consideration, and perhaps the most important one in its bearings upon the merits of the case. . . .

"The conflicting laws on the subject of allegiance are of a municipal character, and have no controlling operation beyond the territorial limits of the countries enacting them. All uncertainty as well as confusion on this subject is avoided by giving due consideration to the fact that the parties to the question now under consideration are two independent nations, and that neither has the right to appeal to its own municipal laws for the rules to settle the matter in dispute, which occurred within the jurisdiction of a third independent power.

"Neither Austrian decrees nor American laws can be properly invoked for aid or direction in this case, but international law furnishes the rules for a correct decision, and by the light from this source shed upon the transaction at Smyrna are its true features to be discerned.

"Koszta being beyond the jurisdiction of Austria, her laws were entirely inoperative in his case, unless the Sultan of Turkey has consented to give them vigor within his dominions by treaty stipulations. The law of nations has rules of its own on the subject of allegiance, and disregards, generally, all restrictions imposed upon it by municipal codes.

"This is rendered most evident by the proceedings of independent states in relation to extradition. No state can demand from any other, as a matter of right, the surrender of a native-born or naturalized citizen or subject, an emigrant, or even a fugitive

from justice, unless the demand is authorized by express treaty stipulation. International law allows no such claim, though comity may sometimes yield what right withholds. To surrender political offenders (and in this class Austria places Koszta) is not a duty; but, on the contrary, compliance with such a demand would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind. As rendering needless all further argument on this point, the undersigned will recall to Mr. Hülsemann's recollection what took place in 1849 and 1850, in relation to the reclamation of Polish refugees in Turkey by Russia, and of Hungarian refugees (of whom Koszta was one) by Austria. This demand was made in concert, as it were, by two powerful sovereigns, while their triumphant armies, which had just put an end to the revolutionary movements in Hungary, stood upon the borders of Turkey, with power to erase her name from the list of nations. She might well apprehend for herself, as the nations of Western Europe apprehended for her, that a refusal in her critical condition would put in jeopardy her existence as an independent power; but she did refuse, and the civilized world justified and commended the act. Both Austria and Russia placed their respective demands on higher grounds than a right of extradition under the law of nations; they attempted to strengthen their claim by founding it upon the obligations of existing treaties — the same, undoubtedly, that are now urged upon the consideration of the United States. Russia and Austria, however, both submitted to the refusal, and never presumed to impute to Turkey the act of refusal as a breach of her duty or a violation of their rights. . . .

"It is to be regretted that this claim for the surrender of Koszta and his companions, so fully considered then and so signally overruled, should be again revived by Austria under circumstances which make the United States a reluctant party in the controversy. . . .

"Austria appears to have been aware that her right to seize Koszta could not be sustained by international law, and she has attempted to derive it from certain treaties, or 'ancient capitulations, by treaty and usage.' The very slight and inexplicit manner in which this authority is adverted to in Mr. Hülsemann's note

apparently indicates, if not a want of confidence in it, at least a desire not to have it scrutinized. . . . It is not shown or alleged that new treaty stipulations since 1849 have been entered into by Turkey and Austria. The 'ancient capitulations' were relied on to support the demand in that year for the surrender of the Hungarian refugees; they were scrutinized, and no such authority as is now claimed was found in them. . . . On this subject it is allowable to resort to the declarations of the public men of the Porte as evidence in regard to an issue of this kind. Their explicit denial may be fairly considered as equivalent to Austria's affirmation without proof, where proof, if it existed, could be so easily adduced. . . . There is now, however, something more decisive from Turkey than the opinion of her public men in opposition to this treaty-claim of Austria. The Government of the Porte has pronounced a judgment in relation to the seizure of Koszta, which Austria herself is bound to respect. It has protested against the conduct of the Austrian agents in that affair as unlawful and as a violation of its sovereignty; but not one word of complaint, not a murmur of dissatisfaction, from Turkey against the conduct of the functionaries of the United States at Smyrna has yet reached this government. . . .

"But if Austria really has such authority by treaties as she now claims, it confessedly extends only to 'Austrian subjects.' . . . By the consent and procurement of the Emperor of Austria, Koszta had been sent into perpetual banishment. The Emperor was a party to the expulsion of the Hungarian refugees from Turkey. The sovereign by such an act deprives his subjects to whom it is applied of all their rights under his government. He places them where he can not, if he would, afford them protection. By such an act he releases the subjects thus banished from the bond of allegiance. . . .

"The proposition that Koszta at Smyrna was not an 'Austrian subject' can be sustained on another ground. By a decree of the Emperor of Austria, of the 24th of March, 1832, Austrian subjects leaving the dominions of the Emperor without permission of the magistrate and a release of Austrian citizenship, and with an intention never to return, become '*unlawful emigrants*,' and

lose all their civil and political rights at home. (*Ency. Amer.*, tit. 'Emigration,' 2 Kent's *Com.* 50, 51.)

"Kosztá had left Austria without permission, and with the obvious and avowed intention never to return: he was, therefore, within the strict meaning of the imperial decree, 'an unlawful emigrant.' He had incurred and paid the penalty of that offence by the loss of all his civil and political rights. . . . It seems to have been the very object of the Austrian decree to dissolve the previous political connection between the 'unlawful emigrant' and the Emperor. In Kosztá's case it was dissolved. . . .

"The undersigned is brought, by a fair application of sound principles of law, and by a careful consideration of the facts, to this important conclusion: that those who acted in behalf of Austria had no right whatever to seize and imprison Martin Kosztá.

"It will be conceded that the civil authority of Turkey, during the whole period of the occurrences at Smyrna, was dormant, and in no way called into action. Under these circumstances — Austria without any authority, Turkey exercising none, and the American functionaries, as Austria asserts, having no right in behalf of their government to interfere in the affair, (a proposition which will be hereafter contested) — what, then, was the condition of the parties at the commencement of the outrage and through its whole progress? They were all, in this view of the case, without the immediate presence and controlling direction of civil or international law in regard to the treatment of Kosztá. The Greek hirelings, Kosztá, their victim, and the Austrian and American agents, were, upon this supposition, all in the same condition at Smyrna, in respect to rights and duties, so far as regards that transaction, as they would have been in if it had occurred in their presence in some unappropriated region lying far beyond the confines of any sovereign state whatever; they were the liege subjects of the law of nature, moral agents, bound each and all alike to observe the precepts of that law, and especially that which is confirmed by divine sanction, and enjoins upon all men, everywhere, when not acting under legal restraints, to do unto others whatsoever they would that others should do unto them; they were bound to do no wrong, and, to the extent of their

means, to prevent wrong from being done — to protect the weak from being oppressed by the strong, and to relieve the distressed. In the case supposed, Koszta was seized without any rightful authority. He was suffering grievous wrong; any one that could, might relieve him. To do so was a duty imposed, under the peculiar circumstances of the case, by the laws of humanity. Captain Ingraham, in doing what he did for the release of Koszta, would, in this view of the case, be fully justified upon this principle. Who, in such a case, can fairly take offence? Who have a right to complain? Not the wrongdoers, surely for they can appeal to no law to justify their conduct; they can derive no support from civil authority, for there was none called into action; nor from the law of nature, for that they have violated.

“To place the justification of the American agents still further beyond controversy, the undersigned will now proceed to show that Koszta, when he was seized and imprisoned at Smyrna, had the national character of an American, and the Government of the United States had the right to extend its protection over him. . . .

“Mr. Hülsemann, as the undersigned believes, falls into a great error — an error fatal to some of his most important conclusions — by assuming that a nation can properly extend its protection only to native born or naturalized citizens. This is not the doctrine of international law, nor is the practice of nations circumscribed within such narrow limits. . . . It is a maxim of international law that domicile confers a national character; it does not allow any one who has a domicile to decline the national character thus conferred; it forces it upon him often very much against his will, and to his great detriment. International law looks only to the national character in determining what country has the right to protect. If a person goes from this country abroad, with the nationality of the United States, this law enjoins upon other nations to respect him, in regard to protection, as an American citizen. It concedes to every country the right to protect any and all who may be clothed with its nationality. These are important principles in their bearings upon the questions presented in Mr. Hülsemann’s note, and are too obvious to be contested; but as they are opposed to some of the positions taken by Austria, the

undersigned deems it respectful in such a case to sustain them by reference to authorities.

“‘The position is a clear one, that if a person goes into a foreign country and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a *subject* for all civil purposes, whether that country be hostile or neutral.’ (1 Kent’s *Com.* 75.)

“‘Again: the same authority says that ‘in the law of nations, as to Europe, the rule is, that men take their national character from the general character of the country in which they reside.’ (*Ibid.* 78.) . . .

“The most approved definitions of a domicile are the following:

“‘A residence at a particular place, accompanied with positive or presumptive proof of continuing there for an unlimited time.’ (1 Binney’s *Reports*, 349.) ‘If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence of a few days.’ (*The Venus*, 8 Cranch, 279.) ‘Vattel has defined domicile to be a fixed residence in any place, with an intention of always staying there. But this is not an accurate statement. It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom.’ (Story’s *Con. of Laws*, § 43.) ‘A person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidence of an intention permanently to reside there as to stamp him with the national character of the state where he resides.’ (*The Venus*, 8 Cranch, 279.)

“Apply these principles to the case under consideration, and the inevitable result is that Koszta had a domicile in the United States. He came to and resided in this country one year and eleven months. He came here with the intention of making it his future abode. This intention was manifested in several ways, but most significantly by his solemn declaration upon oath. There can be no better evidence of his design of making the United States his future home than such a declaration; and to this kind of evidence of the intention, the indispensable element of true

domicile, civilians have always attached importance. (Phillimore, § 188.) . . .

"The establishment of his domicile here invested him with the national character of this country, and with that character he acquired the right to claim protection from the United States, and they had the right to extend it to him as long as that character continued.

"The next question is, Was Koszta clothed with that character when he was kidnapped in the streets of Smyrna, and imprisoned on board of the Austrian brig-of-war *Hussar*? The national character acquired by residence remains as long as the domicile continues. . . . To lose a domicile when once obtained, the domiciled person must leave the country of his residence with the intention to abandon that residence, and must acquire a domicile in another. Both of these facts are necessary to effect a change of domicile; but neither of them exists in Koszta's case. The facts show that he was only temporarily absent from this country on private business, with no intention of remaining permanently in Turkey, but, on the contrary, was at the time of his seizure awaiting an opportunity to return to the United States. . . .

"This right to protect persons having a domicile, though not native-born or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties; he owes the same obedience to the civil laws, and must discharge the duties they impose on him; his property is in the same way, and to the same extent as theirs, liable to contribute to the support of the government. In war he shares equally with them in the calamities which may befall the country; his services may be required for its defence; his life may be perilled and sacrificed in maintaining its rights and vindicating its honor. In nearly all respects his and their condition as to the duties and burdens of government are undistinguishable; and what reasons can be given why, so far at least as

regards protection to person and property abroad as well as at home, his rights should not be coextensive with the rights of native-born or naturalized citizens? By the law of nations they have the same nationality; and what right has any foreign power, for the purpose of making distinction between them, to look behind the character given them by that code which regulates national intercourse? When the law of nations determines the nationality of any man, foreign governments are bound to respect its decision. . . .

"There is another view of this case which places the conduct of the agents of this government at Smyrna upon equally defensible grounds. . . .

"By the laws of Turkey and other eastern nations, the consulates therein may receive under their protection strangers and sojourners whose religion and social manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulate. These consulates and other European establishments in the East, are in the constant habit of opening their doors for the reception of such inmates, who are received irrespective of the country of their birth or allegiance. It is not uncommon for them to have a large number of such *protégés*. International law recognizes and sanctions the rights acquired by this connection.

"In the law of nations as to Europe, the rule is, that men take their national character from the general character of the country in which they reside; and this rule applies equally to America. But in Asia and Africa an immiscible character is kept up, and Europeans trading under the protection of a factory take their national character from the establishment under which they live and trade. This rule applies to those parts of the world from obvious reasons of policy, because foreigners are not admitted there, as in Europe "and the western part of the world," into the general body and mass of the society of the nation, but they continue strangers and sojourners, not acquiring any national character under the general sovereignty of the country.' (1 Kent's *Comm.* 78-79.)

"The Lords of Appeals in the High Court of Admiralty in



England decided in 1784, that a merchant carrying on trade at Smyrna, under the protection of a Dutch Consul, was to be considered a Dutchman as to his national character. (Wheaton's *Inter. Law*, 384; 3 *Rob. Adm. Reports*, 12.)

"This decision has been examined and approved by the eminent jurists who have since written treatises on international law.

"According to the principle established in this case, Koszta was invested with the nationality of the United States, if he had it not before, the moment he was under the protection of the American Consul at Smyrna and the American Legation at Constantinople. That he was so received is established by the *teskereh* they gave him, and the efforts they made for his release. . . .

"Having been received under the protection of these American establishments, he had thereby acquired, according to the law of nations, their nationality; and when wronged and outraged as he was, they might interpose for his liberation, and Captain Ingraham had a right to coöperate with them for the accomplishment of that object. The exceptions taken to the manner of that coöperation remain to be considered. . . .

"It has excited some surprise here that, after a consideration of the circumstances, an impression should be entertained in any quarter that Captain Ingraham either committed or meditated hostility towards Austria on that occasion. . . . The first aggressive act in this case was the seizure of Koszta at Smyrna, committed by the procurement of the Austrian functionaries; the first improper use of a national ship, the imprisonment of Koszta therein, was made by the commander of the Austrian brig *Huszar*. That ship was converted into a prison for the illegal detention of a person clothed with the nationality of the United States, and consequently entitled to their protection. If Austria upholds, as it appears she does, the conduct of the commander of the *Huszar*, she is in fact the first aggressor. This act of the commander of the *Huszar* led to the series of other acts which constitute the ground of complaint against the United States. . . .

"There is a consideration probably not brought to the notice of Austria, and not sufficiently regarded by others, which places the acts of Captain Ingraham in a true light, and repels the inference

of intended hostile demonstrations towards Austria. It was the understanding of the parties that Koszta should be retained at Smyrna while the question of his nationality was pending. Captain Ingraham received satisfactory evidence of a design, on the part of the Austrian functionaries at Smyrna and Constantinople, to disregard this arrangement, and remove him clandestinely from the *Huszar* on board of a steamer, for the purpose of taking him to Trieste. . . . The captain of the *St. Louis* was placed in the perplexing alternative of surrendering their captive, without further efforts, to the sad fate which awaited him, or to demand his immediate release, and, in case of refusal, to enforce it. . . . It is not just to Captain Ingraham to look at the affair as it was at the precise point of time when the demand for the release of Koszta was made. The antecedent events qualify and legalize that act. The Austrian functionaries had obtained the possession of the person of Koszta, not in a fair or allowable way, but by violating the civil laws of Turkey and the rights of humanity. Under these circumstances, their custody of him was entitled to no respect from the agent of the government which, by virtue of his nationality, had a right to protect him. . . .

"The undersigned yields a ready assent to that part of Mr. Hülsemann's note relative to the war-making power. The doctrine contained in it is sound, and well sustained by most approved authorities; but the undersigned has not been able to discover its applicability to the case under consideration. . . .

"Before closing this communication the undersigned will briefly notice the complaint of Austria against Captain Ingraham for violating the neutral soil of the Ottoman Empire. The right of Austria to call the United States to an account for the acts of their agents affecting the sovereign territorial rights of Turkey is not perceived, and they do not acknowledge her right to require any explanation.

"If anything was done at Smyrna in derogation of the sovereignty of Turkey, this government will give satisfactory explanation to the Sultan when he shall demand it, and it has instructed its minister resident to make this known to him. He is the judge, and the only rightful judge, in this affair, and the injured party too. He has investigated its merits, pronounced judgment against

Austria, and acquitted the United States; yet, strange as it is, Austria has called the United States to an account for violating the sovereign territorial rights of the Emperor of Turkey. . . .

"The President does not see sufficient cause for disavowing the acts of the American agents which are complained of by Austria. Her claim for satisfaction on that account has been carefully considered, and is respectfully declined.

"Being convinced that the seizure and imprisonment of Koszta were illegal and unjustifiable, the President also declines to give his consent to his delivery to the Consul-General of Austria at Smyrna; but, after a full examination of the case, as herein presented, he has instructed the undersigned to communicate to Mr. Hülsemann his confident expectation that the Emperor of Austria will take the proper measures to cause Martin Koszta to be restored to the same condition he was in before he was seized in the streets of Smyrna on the 21st of June last."

President Pierce, in his annual message of December 5, 1853, refers to this incident: "Under an arrangement between the agents of the United States and of Austria, he [Koszta] was transferred to the custody of the French Consul-General at Smyrna, there to remain until he should be disposed of by the mutual agreement of the consuls of the respective governments at that place. Pursuant to that agreement, he has been released, and is now in the United States."

(Moore: *Digest of International Law*, vol. III, pp. 824-35.)

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## § 35. NATIONALITY OF INDIVIDUALS

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### THE CASE OF DUBUC (1910)

*The Secretary of State to Ambassador Bacon*

DEPARTMENT OF STATE,  
Washington, February 16, 1910.

Sir: I enclose a copy of a letter addressed to this Department on January 31, 1910, by Mr. John Gibson Hale, of Chicago, Ill., inquiring whether Mr. René Dubuc, who was born in France, has

not yet attained his majority, and claims citizenship of the United States through the naturalization of his father, may visit his native land without fear of molestation on account of the military-service laws. You will note that Mr. Hale states that some time ago he addressed the French Minister of Justice in this matter, but has received no response to his letter.

The Department desires you to present this case to the French Government, explaining that Mr. Dubuc was naturalized as a citizen of the United States through the naturalization of his father under our law. You will inquire whether he would be held liable to perform military service should he place himself within French jurisdiction for a short time.

I am, etc.,

P. C. KNOX.

*Ambassador Bacon to the Secretary of State*

AMERICAN EMBASSY,  
Paris, March 24, 1910.

*Sir:* Referring to the Department's No. 29, of February 16, 1910, I have the honor to forward herewith a copy and translation of the note dated March 10, with memorandum, which I received from the Minister of Foreign Affairs in reply to my query in pursuance of your instructions. . . .

As you will observe in the above-mentioned memorandum, in the absence of conventions the French tribunals declare to be French minor children of French parents naturalized in foreign countries during their minority. Mr. Dubuc, according to French law, is therefore French, and consequently subject to all the obligations of a Frenchman, notably those of military service. His naturalization abroad will not cause him to lose his quality of Frenchman except if it has been authorized by the French Government. (Art. 17, par. 2, of the Civil Code.)

Mr. Pichon further states that the Keeper of the Seals, after informing him that Mr. Dubuc solicited, through the medium of Mr. John Gibson Hale, attorney and counselor, Marquette Building, Chicago, the necessary authorization to become an American citizen, in order that his naturalization be recognized in France, has requested him to inform the petitioner that by reason of his

minority, he being born in Paris on February 20, 1890, he could not now be authorized to change his nationality, and that after the 26th of February, 1911, when he will have attained his majority, if he persists in his intention, he should renew his request and annex thereto his birth certificate, that of his father, and the naturalization papers of the latter.

In compliance with this request the Minister of Foreign Affairs states that he has instructed the French Consul at Chicago to bring to the notice of Mr. Dubuc the above information.

I have, etc.,

ROBERT BACON.

[The translated memorandum communicated to Mr. Bacon by the French Minister of Foreign Affairs is as follows:]

According to the terms of Article VIII § 1 of the French Code, is French —

Every individual born of a Frenchman in France or abroad.

Foreign naturalization obtained by a French father only produces, according to French legislation, strictly individual results and is inoperative with a view to changing the French nationality of his minor children born before his naturalization, even though the legislation of certain foreign countries admits that the naturalization of the head of the family produces a collective effect and extends by right to his wife and his minor children.

In this case there is a conflict of laws — a conflict which each sovereign and independent nation settles by making the national law prevail in its territory over the foreign law.

France has concluded with certain states — notably Switzerland (Convention of July 23, 1879) and Belgium (Convention of July 23, 1891) — conventions with a view to the settlement of the conflict of laws of this nature by the recognition for the benefit of minors of a right of option for the nationality of their parents at their majority.

No convention of this nature exists between France and the United States.

In the absence of conventions the French tribunals, sole judges of questions of nationality, declare to be French minor children of French parents naturalized foreigners during their minority. In this sense may be cited, notably:

The decision of the court of Besançon of July 30, 1902. (Gide case, *J. Dr. Int. Pr.* [1903], p. 370.)

A decision of the Court of Appeal of Amiens of July 13, 1899 (Vacquerel case, *J. Dr. Int. Pr.* [1902], p. 837), has moreover established that a child born in the United States of a French father who had taken out his naturalization papers, but who was not yet naturalized, was French, as being born of a father who had not yet lost his quality of Frenchman at the time of his birth.

The child remaining French continues, moreover, subject to all the obligations of a Frenchman, notably those of military service.

If he is still subject to military service for the active army his naturalization abroad will not cause him to lose quality of Frenchman except if his naturalization has been authorized by the government (art. 17, par. 2, of the Civil Code).

*The Secretary of State to Ambassador Bacon*

DEPARTMENT OF STATE,  
Washington, November 11, 1910.

*Sir:* . . . The Department desires that you ascertain, if possible, and report as to what fee, if any, must accompany Mr. Dubuc's request for authorization to relinquish French nationality. The Department also desires to be informed to what official Mr. Dubuc's request should be addressed.

I am, etc.,

P. C. KNOX.

*Ambassador Bacon to the Secretary of State*

AMERICAN EMBASSY,  
Paris, November 30, 1910.

*Sir:* Referring to your instruction No. 159 of November 11, 1910, relative to the nationality of René Dubuc, I have the honor to inform you that upon inquiry at the Foreign Office I learn that, in order for Mr. Dubuc to relinquish his French nationality, when he becomes of age it will be necessary for him to apply, through the French Consul at Chicago, to the Minister of Justice for such authorization, and at the same time to pay a fee of 637 francs.

I have, etc.,

ROBERT BACON.

(*Foreign Relations of the United States, 1910*, pp. 514-16.)

## JUS SANGUINIS AND JUS SOLI IN CHILE (1907)

*Chargé Jones to the Secretary of State*

AMERICAN LEGATION,  
Santiago, August 5, 1907.

*Sir:* I have the honor to transmit herewith a copy of an interesting decision handed down on the 18th of July by the Court of Appeals of Santiago. In this it is decided that a child born in Chile of Spanish parents is not necessarily a Chilean citizen, and that therefore the laws prescribing military service for all citizens of this country cannot be enforced against him. This marks a triumph of the principle of the *jus sanguinis* over the *jus soli*.

The facts of the case are as follows:

A minor, the son of Spanish parents, Hector Garcia by name, was summoned to do military service according to the Chilean laws. Garcia refused to enroll himself as a Chilean soldier, stating that, although he was born in Chile, he was a Spanish subject, and as such the duty of military service in Chile could not be demanded of him. Whereupon he was brought before a lower court and sentenced to thirty days' confinement in jail.

Appeal was then taken from this decision to the higher court.

It appears that the appellant had been registered in the Spanish Legation by his parents and that this entry had been duly transmitted and reported to the Spanish Foreign Office. According to the Spanish Constitution the children of Spanish parents are Spanish citizens, whether the birthplace of the offspring be Spain or a foreign country. On the other hand, all persons born in Chile are declared by article 6 of the Chilean Constitution citizens of that country. In this conflict of the fundamental laws of the two countries the court adopted the opinion of the great commentator of the Chilean Constitution, Señor Jorje Huneeus, according to whom, "in spite of the imperative terms in which the clause heading this article [clause 1, article 5] is written, it does not impose the character of Chilean citizenship, but only offers it to those who, possessing the qualifications enumerated in the different provisions included in this article, are freely willing to accept it, when, at the same time, the citizenship of another country is offered to

them by the legislation in force in the latter." The parents of Hector Garcia made use of the right of election possessed by their son by registering him in the Spanish Legation.

The clerk of the court states that the government will not carry the case further, but accepts the decision as it stands.

I have, etc.,

HENRY L. JANES.

(*Foreign Relations of the United States, 1907*, pp. 124-25.)

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## THE CANEVARO CLAIM

### ITALY v. PERU

*The Permanent Court of Arbitration at The Hague, 1912*

THIS case, as far as the issue involved is concerned, is one of the least important of the dozen or so that have been referred to The Hague; but the fact that Peru was willing to submit her domestic law to the interpretation of an arbitral tribunal reveals the possible extent of jurisdiction that may attach in time to an international supreme court.

The subject-matter of the case was the claim of the brothers Canevaro for the payment of a debt owing them by the Peruvian Government. The history of the financial and legal transactions leading up to the submission of the claim to The Hague is as follows:

In 1880, the Government of Peru, then under the dictatorship of Pierola, borrowed from the firm of José Canevaro & Sons, of Lima, the sum of £77,000, to meet which were created pay checks for that amount, payable at various periods. But the payments were not made as stipulated, because of civil disorders.

In 1883, on the death of José Canevaro, the firm was dissolved, but in 1885 it was restored under the same name, the members composing it being José Francisco and Cesar Canevaro, both of whom were of Peruvian nationality, and Raphael Canevaro, who could claim double nationality, having been born in Peru of an Italian father. The same year (1885) a payment of £35,000 was made on this debt, leaving £43,140 unpaid. By various measures between 1886 and 1898, the Peruvian Government, in view of the



depressed state of the national finances, placed the domestic debt under severe regulation and provided for the redemption of its bonds on terms unfavorable to the creditors. In order to discredit all acts of Pierola, the government, by a law of October 26, 1886, announced that it would acknowledge only obligations issued by the national bureaus up to January, 1880. The Canevaro transactions with Pierola dated from December 23, 1880, and hence, on a literal interpretation of the law, might have been invalidated; but as was pointed out by the tribunal in its award, the terms of the agreement to arbitrate indicated that the Peruvian Government had not excluded this claim from the consideration accorded to the financial measures antedating Pierola's régime.

On June 12, 1889, provision was made by the government to pay off the domestic debt by issuing one per cent bonds. At that time the Canevaro company and its claim were undoubtedly Peruvian and thus came within the scope of the law reducing the value of any claim nationally owned.

In 1890 the company requested payment for the amount outstanding, and in 1891 further pressed its claim, invoking in its favor article 14 of the law of June 12, 1889, which provided more liberal treatment for that part of the Peruvian debt created to provide for military measures against Chile. But the Peruvian tribunals did not give the firm the benefit of this provision, because the obligation had been incurred, not for supplies furnished, but to repay previous drafts.

The company ceased to exist in 1900, on the death of José Francisco Canevaro, and the ownership of the claim in question passed to the brothers Napoleon, Carlo, and Raphael Canevaro, the first two of whom were Italians. It was by virtue of their nationality that Italy became interested in the payment of the claim, with the result that, on April 25, 1910, the Governments of Italy and Peru made an agreement to submit the Canevaro claim to arbitration, and a special tribunal of three, constituted under the agreement, met at The Hague on April 20, 1912. The arbitrators were M. Fusinato, of Italy, M. Calderon, Peruvian Minister at Brussels, and M. Renault, of Paris, who was President.

The questions submitted to the tribunal were as follows:

"Ought the Peruvian Government to pay in coin, or in accordance with the provisions of the Peruvian law on the domestic debt of June 12, 1889, the drafts (*lettres à ordre, cambiali, libramientos*) now in the possession of the brothers Napoleon, Carlo, and Raphael Canevaro, and which were drawn by the Peruvian Government to the order of the firm of José Canevaro & Sons for the sum of 43,140 pounds sterling, plus the legal interest on the said amount?

"Have the Canevaro brothers a right to demand the total of the amount claimed?

"Has Count Raphael Canevaro a right to be considered as an Italian claimant?"

The tribunal rendered its award May 3, 1912. Addressing itself to the third question first, it decided that, in the matter of the nationality of Raphael Canevaro, "the Government of Peru has a right to consider him as a Peruvian citizen and to deny his status as an Italian claimant." He had been born in Peru, and thus by Peruvian law was a Peruvian, though by *jus sanguinis* Italy might also claim him. The decisive fact, for the tribunal, was the exercise of Peruvian citizenship by Raphael; he had been a candidate for the Senate, and had even acted abroad in the Peruvian consular service. This decision as to Raphael's nationality answered the second question, in effect; for it followed that the tribunal had to pass judgment upon the claim only in so far as it was owned by the brothers of Italian nationality.

The main question — the method of payment — depended upon the significance of the nationality of the two Italian claimants. Did the succession of Italians to the partial ownership of what, when the law of 1889 was enacted, was a wholly Peruvian claim, remove their share of the claim from the operation of domestic law and require payment in gold? That the Canevaro debt was subject to domestic law was acknowledged, in the opinion of the tribunal, by the Canevaro firm itself when in 1891 it invoked article 14 of the law in question in order to get preferential treatment. The fact that the certificates issued in 1880 were to order and payable in pounds sterling did not give the debt the status of a foreign holding, for it was a question "of a settle-

ment of a domestic nature of evidences of debt created at Lima and payable at Lima, in compensation for a payment made voluntarily in behalf of the Peruvian Government;" and there was nothing in the circumstances attending the debt "to prevent the Peruvian law from being applicable to evidences of debt created and payable in the territory in which said law governed." Thus only the change in ownership, if anything, could alter the method of payment prescribed.

On this point, however, the tribunal held that the Italian claimants had merely the rights that they had obtained from the original owners, and that, too, whether succession were by endorsement or inheritance. According to the Peruvian Code of Commerce of 1902, "Endorsement subsequent to maturity is to have the force only of an ordinary conveyance," while it is a general rule, the tribunal pointed out, "that heirs receive property in the condition it was in when in the possession of the decedent." Hence the claim was completely within the operation of the law of June 12, 1889. The contention that the claimants were entitled to indemnity for delay in payment was considered by the tribunal to be outside the terms of submission.

In fixing the amount to be paid, the tribunal allowed interest of 4 per cent per annum after December 23, 1880, until maturity of the bonds, and thereafter 6 per cent until January 1, 1889. After the latter date, principal and interest, converted into bonds, were to yield 1 per cent interest per annum in gold, until final payment.

Accordingly,

"The arbitral tribunal decides that the Peruvian Government shall, on July 31, 1912, deliver to the Italian Legation at Lima, on account of the brothers Napoleon and Carlo Canevaro:

"1. In bonds of the domestic (1 per cent) debt of 1889, the nominal amount of 39,811 pounds, 8 shillings, and 1 penny sterling upon the surrender of two-thirds of the bonds delivered on December 23, 1880, to the firm of José Canevaro & Sons;

"2. In gold, the sum of 9,388 pounds, 17 shillings, 1 penny sterling, constituting the interest at 1 per cent from January 1, 1889, to July 31, 1912.

"The Peruvian Government may delay the payment of this

latter sum until January 1, 1913, provided it pays interest thereon at the rate of 6 per cent from August 1, 1912."

(*American Journal of International Law*, vol. VI, pp. 709-12; 746-54; *Revue Générale de Droit International Public* [1913], vol. XX, pp. 317-72; G. G. Wilson: *The Hague Arbitration Cases*.)

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### § 36. EXPATRIATION AND PERPETUAL ALLEGIANCE

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#### THE WARREN AND COSTELLO CASES (1867)

PROFESSOR MOORE, in his *Digest of International Law*, gives the following account of the diplomatic discussion between the United States and Great Britain in regard to the matter of expatriation,<sup>1</sup> especially with reference to the case of Warren and Costello:

Early in 1866 the United States Consul at Dublin transmitted to the Department of State a correspondence in relation to a number of naturalized citizens of the United States who had been arrested and thrown into prison. It appeared by the correspondence that the Lord Lieutenant of Ireland had declined to recognize the interposition of the consul with respect to persons who were originally British subjects, on the ground that they must still be regarded as such. Mr. Seward, referring to this statement, observed that there was a conflict between the laws of Great Britain and those of the United States with regard to the effect of naturalization, Great Britain declining to concede that a native British subject could divest himself of his allegiance by renouncing it, while the United States had maintained that the process of naturalization completely absolved the person from his former allegiance, and invested him "with the right equally with native-born citizens to such protection and care of the Government of the United States as it can, in conformity with treaties and the law of nations, extend over him, wherever he may sojourn, whether in the land of his nativity or in any other foreign country." The conflict, when once practically raised, could, said Mr. Seward, find

<sup>1</sup> A concise yet sufficient consideration of this whole question of the doctrine of expatriation will be found in J. B. Moore's *American Diplomacy*, pp. 168-99.

a friendly adjustment only by concession, in the form of a treaty or of mutual legislation, or of some form of arbitrament. The answer of the Lord Lieutenant, if it should be adopted by Her Majesty's Government, "must bring the question up for immediate solution." Among the naturalized citizens of the United States, in regard to whom the discrimination had been made, were some who had borne arms in defense of the United States during the Civil War. Her Majesty's Government could conceive "how impossible it would be for the Government of the United States to agree to a denial or abridgment of their right to extend to them the same natural protection and care which the United States extend to native-born citizens of the United States in similar cases."

The foregoing cases grew out of the Fenian movement. In consequence of the arrest of naturalized American citizens on charges connected with this movement, the question of expatriation assumed an acute form. Among the numerous cases arising at that time, the most notable one, historically, is that of Warren and Costello, two naturalized American citizens who were tried and sentenced in Dublin, in 1867, for treason-felony, on account of participation in the *Jacmel* expedition. It was shown that they had come over to Ireland in that vessel and had cruised along the coast for the purpose of effecting a landing of men and arms, in order to raise an insurrection. At their trial they claimed, as American citizens, a jury *de medietate linguae*, which was then allowed by the English law to aliens. The demand was refused on the ground of their original British allegiance. This incident, together with others, produced an excitement that, as Mr. Seward stated, extended "throughout the whole country, from Portland to San Francisco and from St. Paul to Pensacola." The subject was discussed in Congress, and exhaustive reports were made both in the Senate and in the House of Representatives on the subject of expatriation. The cause of the advocates of the right of voluntary expatriation was greatly strengthened by the conclusion by Mr. Bancroft, February 22, 1868, of the convention with the North German Union, by which the naturalization of German subjects in the United States, after an uninterrupted residence of five years, was recognized. By an act of July 27, 1868, Congress de-

clared "the right of expatriation" to be "an inherent right of all people," and pronounced "any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation" to be "inconsistent with the fundamental principles of this government." It was further declared that naturalized citizens of the United States should, while abroad, be entitled to receive from the United States "the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances." It was, moreover, declared that, whenever it should be made known to the President that any citizen of the United States had been unjustly deprived of his liberty by or under the authority of any foreign government, it should be the President's duty forthwith to demand of such government the reasons for the imprisonment, and, if it appeared to be wrongful and in violation of the rights of American citizenship, forthwith to demand the release of such citizen, and, if the release was unreasonably delayed or refused, to use such means not amounting to acts of war as might be necessary and proper to obtain such release, and then, as soon as practicable, to communicate all the facts and proceedings to Congress.

(Extract from Moore: *Digest of International Law*, vol. III, pp. 579-80.)

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### THE CASE OF JOHN B. FOICHAT (1884)

JOHN B. FOICHAT was born in France, January 4, 1853. In 1870, at the age of seventeen, he came to the United States, where, in 1883, he was admitted to citizenship. In August, 1883, he obtained a passport and went to France, arriving there in the following month. In November, 1884, he was arrested on the charge of having failed to report for military service. He protested and, exhibiting his naturalization papers and passport, demanded that he be released. He was kept, however, two days and three nights in the military prison at Chambéry, and was then handcuffed and taken to the military prison at Grenoble to be tried by court-martial. He was detained at Grenoble four days, when he was released through the efforts of the United States Consul at Lyons.

March 25, 1884, the American Minister at Paris was instructed to look into the case and, if the facts were found to be as stated, to present it to the Minister of Foreign Affairs, with an earnest request that it might receive early and just consideration and that a reasonable pecuniary indemnity might be paid. The French Government admitted that the facts were substantially as stated, but denied that they entitled the claimant to any compensation. In a note to the American Legation, October 22, 1884, M. Ferry, Minister of Foreign Affairs, said that Foichat was arrested on the charge of *insoumission*,<sup>1</sup> and added: "Upon principle we have constantly

<sup>1</sup> In a dispatch to Mr. Frelinghuysen, No. 665, November 13, 1884, Mr. Vignaud makes an extended and interesting report on the French law of citizenship, especially with regard to military service. The son of every Frenchman, says Mr. Vignaud, is registered at the place of his birth if born in France, or at the place of his family's residence if born abroad, as liable to military service. This registration forms in each commune a recruiting list, which is drawn up every year by the mayor, who afterwards sends it to the prefecture of the department, where it is combined with all the other lists in a general one, comprising all men belonging to the department born twenty years before. When the time comes each person on the list is notified to present himself at a designated place. If he resides abroad the notice is served on him through his consul or through members of his family residing in France. If he fails to report, he is charged with the offense known to French law as "insubmission" (*insoumission*), and the police are ordered to arrest him when found. If, when arrested, he does not resist, he is generally dealt with gently; if he resists, he is handcuffed and treated roughly. The police deliver him to the military authorities as an *insoumis*, and a court-martial proceeds to try him as such. If he pleads that he has renounced his original nationality, the court-martial suspends action while the defendant appeals to the civil courts. While this appeal is pending he is usually left at liberty. In the civil court the course of procedure is by summons to the prefect of the department to erase the individual named from the recruiting list. On production of duly authenticated proofs of foreign nationality, by birth or by naturalization, the civil court renders a judgment to the effect that the defendant, having ceased to be a French citizen, cannot serve in the French army. The defendant is then sent back to the military court. His name is erased from the military rolls; but he is then tried for the offense of "insubmission" committed before the rendering of the judgment that he had lost French nationality. If three years have elapsed since he was naturalized, he is discharged by limitation. If such a period has not elapsed, he is sentenced to a fine or to a few weeks' or months' imprisonment, or both, according to the circumstances. If he has lived a long time abroad, and the circumstances indicate that he expatriated himself in good faith and not for the purpose of evading his military obligations, the sentence is made as light as possible, if not altogether omitted; but, in the contrary case, it is made as severe as possible. When, whether punished or not, he is released by the military authorities, he is again turned over to the civil authorities, who, if he is considered a *bona fide* foreigner, discharge him, but, in the contrary case, order him to be expelled. "Nine times out of ten," says Mr. Vignaud, "an order of expulsion awaits the Frenchman naturalized abroad who ventures to come to France before having performed his military service. The interposition of the legation in such cases is useless. The French Government is very sensitive on this

refused to admit that a Frenchman, naturalized in a foreign country, can be exempted if he returns to France from being answerable for the offense of insubmission, when the naturalization has taken place subsequently to the existence of the offense. You will understand that we cannot abandon this jurisprudence, which is

point, and will listen to no request tending to allow one who has averted military service by placing himself under a foreign flag to remain unmolested, and apparently in defiance of the French military laws, in the midst of those who are rigorously held to obey them. We have occasionally obtained a short extension of the time allowed for leaving France. We have never secured the revocation of an order of expulsion issued under such circumstances." (Moore: *Digest of International Law*, vol. III, pp. 594-95.)

The following "notice to citizens formerly subjects of Italy who contemplate returning to that country" was issued by the Department of State at Washington, March 18, 1901:

"The information given below is believed to be correct, yet it is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"Italian subjects between the ages of twenty and thirty-nine years are liable for the performance of military duty under Italian law, except in the case of an only son, or where two brothers are so nearly of the same age that both would be serving at the same time, in which event only one is drafted, or when there are two sons of a widow, when only one is taken.

"Naturalization of an Italian subject in a foreign country without consent of the Italian Government is no bar to liability to military service.

"A former Italian subject may visit Italy without fear of molestation when he is under the age of twenty years; but between the ages of twenty and thirty-nine he is liable to arrest and forced military service, if he has not previously reported for such service. After the age of thirty-nine he may be arrested and imprisoned (but will not be compelled to do military duty) unless he has been pardoned. He may petition the Italian Government for pardon, but this Department will not act as the intermediary in presenting his petition." (Moore: *Digest of International Law*, vol. III, pp. 615-16.)

The outcome of the case of Vittorio Gardella was exceptional to this procedure. It appeared that he was born in Italy in 1861 and was taken to the United States when only six years of age. He was naturalized in 1884. He resided in the United States continuously from 1877 to 1895, his home being in the city of New York where he had a wife and family. He was on a visit to Italy when he was drafted into the army. On October 19, 1896, Mr. MacVeagh, United States Ambassador at Rome, brought the case personally to the attention of the Italian Minister for Foreign Affairs, the Marquis Visconti Venosta, and obtained Gardella's release in the form of a grant of unlimited leave, which did not formally waive the contention of the Italian Government. Indeed, the Marquis Visconti Venosta, in informing Mr. MacVeagh of Gardella's release, observed that while he had no doubt lost his Italian citizenship by virtue of article 11, paragraph 2, of the Italian Civil Code, he nevertheless remained "liable to military service in the Kingdom, according to the peremptory provisions of the succeeding article 12," and that the case of Gardella had been disposed of "in an exceptional way" in view of his exceptional situation, of certain amendments which were expected to be made in the law regulating the levy of persons residing abroad when enlisted, and of the interest which Mr. MacVeagh took in the case. (Condensed extract from Moore: *Digest of International Law*, vol. III, pp. 614-15.)



dictated by a question of public order of a most important character, and against which the Government of the United States would be all the less founded in protesting, as it is in conformity with one of the principal provisions which appear in the treaties of naturalization concluded by it with certain powers." M. Ferry then cited article 2 of the treaty between the United States and the North-German Union of February 22, 1868, to the effect that a naturalized citizen remains punishable for offenses committed prior to his emigration, subject to the statutes of limitation.

(Taken textually from Moore: *Digest of International Law*, vol. III, p. 593.)

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### § 37. PROTECTION OF THE LIFE, LIBERTY, AND PROPERTY OF NATIONALS WITHIN ANOTHER STATE

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THE many important cases which fall under this heading will be found in other sections.

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### § 38. NATIONALITY AND PROTECTION OF CORPORATIONS

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#### THE CASE OF THE CARACAS WATERWORKS (COMPAGNIE GÉNÉRALE DES EAUX DE CARACAS)

*Belgian-Venezuelan Mixed Claims Commission, 1903*

*Filtz*, Umpire:

"The umpire having examined and studied the documents in the record and considering:

"That article 1 of the protocol of Washington declares that the Commission has jurisdiction to examine and decide all Belgian claims against the Republic of Venezuela which have not been settled by diplomatic agreement between the two governments, and which may have been presented to the commission by the Belgian Government or by the Legation of Belgium at Caracas;

"That the present claim has not been settled by diplomatic agreement between the two governments, and that it has been pre-

sented to the commission by the agent of the government at Caracas;

"That the claimant company's Belgian character has not been disputed, and that it has not lost it, because among the holders of the bonds which have been issued by the Government of the Republic persons of a different nationality are found;

"For these reasons declares that the commission has jurisdiction and orders that it proceed to decide upon the merits without delay."<sup>1</sup>

(*Venezuelan Arbitrations of 1903*, prepared by J. H. Ralston [Washington, 1904], pp. 275-76.)

### THE ALSOP CLAIM

*Award pronounced by His Majesty King George V as Amiable Compositour between the United States and Chile, July 5, 1911*

THIS claim, like many others pressed against the Latin-American states, had its origin in the unstable economic and political conditions so often found in those countries. Though finally assumed by Chile, it arose out of transactions had by the Bolivian Government with one Pedro Lopez Gama, a Brazilian, who, by various contracts between 1860 and 1876, had acquired extensive rights in the development of the guano industry. He was assisted in his financial arrangements by the firm of Alsop and Company, the members of which were American citizens, though the firm itself was registered in Chile. In 1875 Gama assigned all his claims against Bolivia to the Alsops, and in 1876 this assignment was recognized by the Bolivian Government through an agreement entered into with Mr. Wheelwright, the liquidator of the Alsop firm, looking to the discharge of all obligations due by Bolivia to Gama. This, known as the Wheelwright contract, was the basis of the claim in question, and under it Bolivia admitted an indebtedness to Alsop and Company of 835,000 bolivianos with interest at the rate of five per cent per annum, not compound-

<sup>1</sup> Having decided this preliminary question of jurisdiction, the umpire in his decision as to the merits of the case allowed damages to the amount of 10,565,199.44 bolivars, or about three-fourths of the claim. In making this award the umpire gave as one of his grounds: "It is not to be considered whether foreign bondholders can indirectly take advantage of its action [to recover the damages]."

able. This debt was to be liquidated by liens on customs receipts and by concessions in the operation of government silver mines. At that time the customs duties for the coast provinces of Bolivia were collected at the Peruvian port of Arica under an arrangement whereby the duties were divided between the two states without any further revenue collections at the Bolivian frontier. By the contract with Wheelwright, Bolivia agreed to apply toward the liquidation of the Alsop claim the sums by which the Bolivian share of the customs duties exceeded 405,000 bolivianos annually. Bolivia was expecting a new arrangement with Peru under which her revenue would be materially increased, and this was the surplus contemplated in the Wheelwright contract. The mining privileges applied to certain "estacas" or areas which, under Bolivian mining law, were reserved to the government. The right to operate these was given to Alsop and Company, sixty per cent of the net proceeds to go to the firm and forty per cent to the government. The latter share, however, was not actually to be paid to Bolivia, but was to be retained by the Alsops and used in liquidation of the debt.

In 1879 war broke out between Bolivia and Chile and a few months later Peru was involved as well. One of its results was, that the port of Arica, together with the coast of Bolivia, came under the military occupation of Chile, and thus Bolivia was unable to discharge her obligations under the Wheelwright contract. This temporary occupation became permanent under the Pact of Indefinite Truce in 1884 and Chilean sovereignty over the Bolivian coast was finally recognized by treaty in 1904. In the meantime, the Peruvian port of Arica had been ceded to Chile in 1883, and under the Pact of 1884 a new customs agreement had been made between Chile and Bolivia, whereby twenty-five per cent of the receipts were to be retained by Chile and forty per cent more in satisfaction of war claims against Bolivia; the remaining thirty-five per cent went to Bolivia. From 1880 — the date of the occupation of Arica — to 1884, Chile had levied the duties by virtue of her right as military occupant and had appropriated the revenues to her own purposes, giving no recognition to the Alsop claim to a share of the receipts.

The mining operations proved equally unsatisfactory to the

firm. Even under Bolivian sovereignty it had been difficult to get possession in all cases and many of the properties had not come under the firm's control at the outbreak of war. After occupation by Chile, Bolivia was no longer able to give possession, for Chile regarded the "estacas" as Bolivian public property and hence passing to Chile as conqueror. The rights of the firm were not regarded as "real" rights except where possession had actually been entered upon, and, on this ground, the Chilean courts refused to recognize title on the part of the firm to some of the properties claimed under the Wheelwright contract.

Failing to get settlement from either Chile or Bolivia, the firm invoked action by the Government of the United States. While still considering Bolivia as liable for the original debt under the Wheelwright contract, the Government of the United States contended that a claim for the amount might justly be made upon Chile. This was done before the Claims Commission of 1890, and again in 1894, but was dismissed on the ground that the firm was a "juridical entity possessing Chilean nationality." The same treatment was given to the claim by another Claims Commission in 1901, but on that occasion the agent of Chile made the statement that "in order to induce the Bolivian Government to sign the definite treaty of peace which has been negotiated for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty." To that end it was finally agreed by treaty in 1904 that Chile should appropriate 2,000,000 pesos in gold to discharge certain obligations of Bolivia, among which the Alsop claim was specified, and 4,500,000 for certain other claims. As the claims exceeded the amount designated, payment was to be made *pro rata*. In a note explanatory of the treaty, the Chilean Government, through its negotiator, considered "that the obligation which Chile contracts by article 5 of the said treaty comprises that of arranging directly with the two groups of creditors recognized by Bolivia for the permanent cancellation of each of the claims mentioned in said article, thus relieving Bolivia of all subsequent liabilities."

Having assumed this liability, the Chilean Government offered a certain sum in settlement, but the Government of the United

States refused it "as being insufficient to satisfy either the just claim of Alsop and Company on Bolivia or Chile, or the liability which Chile has herself undertaken on behalf of Bolivia." Upon failure to arrive at a diplomatic settlement, the two governments on December 1, 1909, agreed upon a protocol wherein they submitted the whole controversy to His Majesty, Edward VII, who, as *amiable compositeur*, was empowered to determine the amount, if any, equitably due the claimants in the Alsop claim.

King Edward died before he could act in accordance with the protocol, but on request of the parties George V consented to take his place. To assist him in arriving at an award, His Majesty designated a commission of three — Lord Desart, Lord Robson, and C. J. Hurst — to study all necessary documents and to submit a report as to the amount equitably due. In their report, which became the basis of the award, the commissioners defined the function of an *amiable compositeur* to be one "of pronouncing an award which shall do substantial justice between the parties without attaching too great an importance to the technical points which may be raised on either side." In accordance with the report, King George rendered his award on July 5, 1911.

In its case and counter-case in support of the claim, the Government of the United States emphasized the fact that "the firm of Alsop and Company, whatever its status may have been as a matter of mere legal fiction, was in essence and in fact wholly American, and that its members, being American citizens, investing their own American capital, the Government of the United States had a right to make and to continue to make its representations in behalf of these American citizens, and for the protection of this American property in respect to any and all actions which in the judgment of the Government of the United States were injurious and contrary to the law of nations." Several precedents were cited in support of its action, among them the Cerruti case in Colombia and the Delagoa Bay Railway case. The real parties in interest were not "the artificial entity of Alsop and Company, but the American citizens who composed the firm," or, as the protocol put it, "the claimants in the Alsop claim," all of whom were citizens of the United States. As to the merits of the claim itself, the position of the United States was clear: it

considered the Wheelwright contract as "legal, valid and equitable in all its parts" and to be regarded as existing until the debt was satisfied. The debt was originally due from Bolivia and that state still remained liable until it was paid with interest. The United States did not contend that Chile was liable upon the Wheelwright contract, for such an obligation was personal to Bolivia as a state, and did not pass with the transfer of the conquered provinces. The claim in question was preferred against Chile on other grounds. Chile had arbitrarily appropriated funds from the Arica customs which under the contract were vested property rights; hence Chile became responsible for money which otherwise would have been remitted to Bolivia, and by her to the Alsops. In effect, the contract had assigned to that firm all the receipts at Arica except the 405,000 bolivianos, and "such assignment . . . was a transaction which could not be set aside and constituted an arrangement which Chile was bound to respect." In this it resembled the case of the Silesian loan.

Chile was further under liability, the United States contended, because she had "interfered with and failed to vindicate the mining rights given to the concessionaries." The United States maintained that the contract of 1876 had obtained for the Alsops "an absolute lease of the mines for a period of twenty-five years, creating a vested right in the firm to the possession of the mines, which the Government of Chile were bound to treat as the property of Alsop and Company," since, in modern practice, private rights suffer no confiscation at the hands of a conqueror.

Finally, the United States considered Chile responsible for the payment of the claim by reason of "repeated promises and diplomatic undertakings" made by the Government of Chile to the Government of the United States as well as to the Government of Bolivia, especially in the Treaty of 1904, by which "the obligation of Chile to meet the contract was complete and unlimited," and in the "secret" notes, in which Chile had made declaration that she recognized the freedom of Bolivia from all liability.

The Government of Chile on its part, contended that the claim was not one for the United States to press, for quoting the Commission of 1901, the firm of Alsop and Company "was duly

created, incorporated, and registered under the Chilean law," and hence was a juridical person of Chilean domicile. This left the claim a matter for the Chilean courts, not for diplomacy, but on no occasion had the Alsops "put forward the slightest claim, either to the Government of Chile or to her tribunals, for the payment of this debt." As to the Wheelwright contract, no liability in any of its parts could attach to Chile. The customs at Arica had been merely a matter of arrangement between Bolivia and Peru, the sovereign of Arica. When Chile entered Arica, she appropriated the customs receipts as legitimate occupant in accordance with the principles of international law. The revenues at Arica had not been encumbered with any local charges that might be construed as going with the land. Only the sovereign could make such an assignment, and Peru had never done so. Bolivia had merely designated part of her income to satisfy a particular obligation. This was a personal undertaking, and when her expected source of income was cut off, Bolivia and her creditors must look to other arrangements. Chile, however, had gone further than required and had agreed to give Bolivia a large share of the customs receipts at Arica. If Bolivia did not satisfy claims against her from these, Chile could not be held responsible.

In the matter of the mines, Chile maintained that Bolivia had, in the first instance, no valid title to the territory in which they were situated; it was Chilean, and Chile had lawfully recovered it by war and was under no necessity to recognize the Alsop concessions. Even if Bolivia's grants were valid, there was no duty to respect them, "as the claims did not arise from debts contracted by Bolivia for the special benefits of this territory, but for the general purposes of the whole of Bolivia, and Bolivia remained liable to pay Alsop and Company from other sources." The mining concessions, according to the Chilean argument, were not "real" rights which a conqueror was bound to respect, but only rights held under a contract of *anticresis*, that is, a contract "whereby there is delivered to the creditor a real property in order that he may pay himself out of the proceeds." When the mines were in actual possession of the firm, their rights had been recognized by Chile; other cases were for the courts to decide.

That the Alsops had to undertake much litigation did not impose upon Chile any liability for claims, as long as there had been no denial of justice in Chilean courts.

In the last place, Chile considered that she had given no undertaking applicable to the claim in question other than that contained in the treaty with Bolivia in 1904. While admitting some liability assumed, she contended that the satisfaction of the Alsop claim was to be limited to the *pro rata* share of the amount set aside in the treaty. Chile stood ready to pay to that extent; indeed, had made offers to that end, and, failing acceptance by the claimants, would make payment to the Bolivian Government, leaving the latter to settle the claim. The notes cited in the argument of the United States did not modify the treaty in any respect, but were only "intended to insure that Bolivia should finally be relieved from any liability under the Wheelwright contract by the payment of the sum provided in article 5 of the treaty: . . . their purpose was in fact to insure that Chile should not pay to any of the claimants their proportion of the 6,500,000 pesos without procuring from the claimants a full discharge so that no further claim could be preferred either against Bolivia or Chile."

In their report to King George the commissioners found no responsibility attaching to Chile under the Wheelwright contract itself. Bolivia had at no time been sovereign of Arica, and hence could put no lien upon its customs. When the Chilean occupation took place, the effect was "to put it out of the power of Peru to carry out the agreement of 1878; consequently, Bolivia's right to any share in the customs collected at Arica determined from that moment." The precedent of the Silesian loan was not applicable, for in that case the customs revenues had been assigned by the sovereign of the territory affected. "The result is," the report went on to say, "that with regard to this part of the case we can only report to Your Majesty that the Wheelwright contract effected no assignment or hypothecation of the Arica customs, that the arrangement embodied in article 2 of that contract was not binding on Chile, that Chile in appropriating the proceeds of the Arica customs, either before or after the Pact of Indefinite Truce in 1884, did not receive the money to the use of



Alsop and Company, and that the claim under this head for \$2,337,384.28 payable in gold is not sustainable."

On the question of the mining concessions the commission reported equally adversely to the claimants. In its opinion, "the rights which Alsop and Company possessed under the Wheelwright contract to work a particular 'estaca' was merely a contractual right against Bolivia; until they had secured possession of the 'estaca,' they had nothing which could fairly be described as property." The occupation transferred the "estacas," being government property, to Chile, but did not bind Chile in any way to give possession to the Alsops; "she was under no obligation to facilitate the transfer of the 'estacas' to Alsop and Company in order that they might use them to obtain money for the payment of a debt owing by Bolivia." Chile had respected actual possession; as regards "estacas" claimed but not obtained, it could hardly be maintained that damages had been suffered, even if Chilean law had refused possession, for operation of the mines, as a whole, had been unprofitable, and thus, apart from all technicalities, there was no equitable claim to indemnity.

The commission, however, considered Chile responsible for the claim on the ground that she had undertaken to pay it. Such an undertaking was not found in any promise given or statement made to the Government of the United States, but in the treaty with Bolivia in 1904 and in the two notes of the same year. The contention of Chile that Bolivia was to be relieved from all her liability by a part payment of it by Chile, did not recommend itself to the commissioners. "The more natural construction of the wording of the two notes is, that they were intended to relieve Bolivia altogether of any further liability under these claims, whether the proportionate share of the six and a half millions was accepted in final settlement or not." Bolivia had reluctantly parted with her coast provinces, and the consideration was this very freedom from all liability for the claims specified in the treaty. Hence, if the intention expressed in the notes was to be carried out, Chile would have to relieve Bolivia of all liability, and if the Wheelwright contract was to be fulfilled, she must make complete payment.

In accordance with the report King George rendered his award as follows:

"Whereas, after mature consideration we are fully persuaded of the wisdom and justice of the said report;

"Now therefore we, George, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India, do hereby award and determine that the sum of two million two hundred and seventy-five thousand three hundred and seventy-five bolivianos is equitably due to the representatives of Alsop and Company.

"Given in triplicate under our hand and seal at our Court of St. James', this fifth day of July, one thousand nine hundred and eleven in the second year of our reign.

"GEORGE R.I."

(*Award, Cases, and Appendices*, published by Government Printing Office, Washington, 1910-11; *American Journal of International Law* [1911], vol. v, pp. 1079-1107.)

## THE DELAGOA BAY RAILWAY ARBITRATION

*Special Arbitral Tribunal at Berne, 1900*

THIS was a case where two governments intervened to protect interests held by their nationals in a foreign corporation when its assets were endangered by the action of the government legally entitled to control it. The circumstances leading to the arbitration were as follows:

On December 11, 1875, in a protocol annexed to a treaty of amity and commerce between Portugal and the Transvaal, it was stipulated that railway communication should be instituted between the port of Lourenço Marques and some point in the Transvaal, each party to promote construction within its own territory. No steps, however, were taken to realize the undertaking until December 14, 1883, on which date the Portuguese Government granted to Colonel Edward MacMurdo, a citizen of the United States, the exclusive right to construct a railway from Lourenço Marques "to the frontier (as yet undetermined)

separating Portuguese territory from the territory of the Transvaal." The contract governing the concession required MacMurdo to organize a company within six months from the date of the contract and to complete construction within three years after his plans had been approved by the Portuguese Government. The concession carried with it the exclusive right to operate the road for ninety-nine years, at the end of which time it was to become the property of the government. By article 2 the government promised neither to construct, nor to grant a concession for, any other railway leading to the Transvaal within a zone of one hundred kilometers on either side of the projected line. By article 42 the government had the right to rescind the contract, if, after the work had commenced, satisfactory progress was not maintained, or if the road was not completed within the time specified. The contract might also be rescinded, after due notice given by the government, in case of total or partial interruption in the promotion of the enterprise. Both the contract and the company to be formed to execute its purposes were to be amenable to the laws and tribunals of Portugal, but any differences that might arise as to the execution of the contract were to be settled by arbitration.

In accordance with the contract the Lourenço Marques and Transvaal Railway Company was organized at Lisbon with a capital of £500,000, its statutes being approved by royal decree on May 14, 1884. By a contract entered into on May 26, 1884, between this company and MacMurdo, the company undertook to issue bonds to the amount of £425,000, the proceeds of which were to be used by MacMurdo to construct the railway. In return, MacMurdo transferred to the company his rights under the concession and received for them 498,940 shares in the company. The Portuguese Government, however, according to its own assertion, had no knowledge of this arrangement until three years after it had been made.

Soon after the government had entered into its agreement with MacMurdo, a delegation from the Transvaal, headed by the President, Paul Krüger, arrived at Lisbon to negotiate a new convention and to discuss the question of railways. Having already interested a Dutch syndicate in the construction of the

Transvaal section, it expressed disappointment at the MacMurdo concession, for, in its opinion, "there was no guarantee that the American concessionaire could find the capital necessary to construct the line." An offer by MacMurdo to sell the concession was rejected by the Boer delegation, the Dutch company considering it exorbitant. In a memorandum addressed to the Minister of the Colonies on May 9, 1884, the delegation asserted that the Transvaal section was dependent for the transportation of constructional material upon the speedy and efficient completion of the line from Lourenço Marques, but that such was not likely to be accomplished by MacMurdo. As an alternative, the delegation suggested that the Portuguese Government authorize the company building the Transvaal section to construct a tramway upon Portuguese territory for the purpose of transporting material for construction from Lourenço Marques, without having to await the completion of MacMurdo's line. On May 16, the Minister of the Colonies, although inclined to favor the proposal for the tramway, refused to make any formal promise that might be construed as disloyal to existing engagements. Next day, however, — May 17, 1884, — the Portuguese Government concluded with the Transvaal delegation a convention supplementary to that of 1875, to which was added a memorandum granting, in effect, the request for the tramway, "provided the Lourenço Marques company does not build its road with the speed necessary to the assurance that work may begin on the Transvaal railway." The Portuguese Government further promised to allow the tramway to be used for the transportation of passengers and freight, should the two companies be unable to reach agreement as to rates. But nothing was to be done to the prejudice of the contract of December 14, 1883.

This memorandum was not communicated to MacMurdo or his company, nor was it made public by the Portuguese Government. The Transvaal, however, did not preserve the same secrecy, and news of it soon found its way into the European press. On June 14, a dispatch in the *London Times* from Amsterdam gave MacMurdo his first intimation about the tramway concession. As a consequence, the financing of the company's bonds was rendered difficult, but on the assurance of the Portuguese

Government that the concession for the tramway was conditional and in no way prejudicial to the MacMurdo contract, the work of the Lourenço Marques company proceeded and its plans, duly submitted, were approved by the Portuguese Government on October 30, 1884, "without any prejudice to the presentation of a project for the latter part of the railway up to the frontier." The length of the line as stated in the plans was approximately eighty-two kilometers, but in August, 1885, the Portuguese Government was informed by its engineer, Major Machado, that this estimate was short of the true distance, and that an additional section of nine kilometers was necessary to bring the line up to the frontier.

On December 28, 1885, the Portuguese Government extended the period for completion to four years on condition that the work begin before June, 1886. But financial difficulties continued, especially after the ratification of the convention with the Transvaal was announced, in February, 1886, and in the course of that year the company had to admit that it had not the necessary capital to proceed. Further assurances, however, were given by the Portuguese Government that the concession had in no way been prejudiced, and, on March 3, 1887, the Delagoa Bay and East African Railway Company was formed in London for the purpose of securing funds to complete the railway. The capital of the English company was £500,000, and to it MacMurdo transferred his contract with the Portuguese company, as well as the shares which he held in it, and received in return shares in the English company to the full amount of its capital. As a result of these financial transactions, the Portuguese company still remained the owner of the MacMurdo concession, but the English company, of which MacMurdo was the chief shareholder, controlled the Portuguese company, "supplied the funds, executed the works, and possessed the entire property of the railway."

In the summer of 1887, the English company was informed for the first time by Major Machado of the proposed change in plans calling for the extension of the railway nine kilometers beyond the terminal point indicated in the original plans. Shortly afterwards, on December 14, 1887, the line of eighty-two kilometers

was accepted by the Portuguese Government and opened to traffic, "with the express reservation that neither the opening of the line nor the official inauguration should imply prejudice to the right of the government to compel the company to construct the last section as well as the rest of the work necessary to complete the undertaking." In reply to inquiries as to the terminal section of nine kilometers, the Portuguese Government, on January 31, 1888, informed the Portuguese company that no decision could be made just then, pending the negotiations with the Transvaal with reference to the boundary, but when once the frontier was defined, a reasonable period would be granted for the completion of the line. This period was fixed, by decree of October 24, 1888, at eight months, the company thus being required to complete the work by June 24, 1889. At first the Portuguese company offered only technical protest, but on November 30, its director at Lisbon represented to the Minister of the Colonies that the approaching rainy season and the consequent physical obstacles would make it impossible to comply with the decree within the period fixed, and a more equitable extension of time was requested. This request was refused by the decree of December 27, 1888, according to which "the period allowed should for all intents and purposes be maintained."

The heavy rains of the season following did much damage to the section of road already built, which further complicated relations between the company and the government. The company, for various reasons, was not able to let the contract for the additional section until March 27, 1889, and it was not until June 10 that the contractor arrived at Lourenço Marques. As the contract was to expire in a few days, the company on June 18 asked for an extension on the ground that the period of eight months was unreasonable and that the rainy season with its resultant damage had constituted a case of *force majeure* [necessity]. In the meantime, on June 3, the British Foreign Office had instructed its representative at Lisbon to do all in his power to induce the Portuguese Government to grant an extension of time in the interests of the English company and at the same time to point out that "under these circumstances, the arbitrary confis-

cation of the British capital invested in the concession, which would result from its threatened annulment, would appear to Her Majesty's Government to be altogether without justification." (*Parliamentary Papers* [1890], *Africa*, No. 1, p. 13.) On June 21, the British Minister at Lisbon requested a definite extension of three months and about the same time the Secretary of State of the United States asked, through its Minister at Lisbon, that action be deferred until it could examine the case more fully on behalf of the American interests involved. These requests were not complied with, and, on June 24, the Portuguese Government proceeded to cancel the concession and to take possession of the railway, in accordance with article 42 of the contract with MacMurdo.

In a note to the Portuguese Government the same day (June 24) Lord Salisbury, the British Foreign Minister, intimated that, failing other settlement, the case would become one for diplomatic intervention. The first step to that end was taken on September 10 in a communication from Lord Salisbury to the Government at Lisbon, which, in part, was as follows:

"... Her Majesty's Government are of opinion that the Portuguese Government had no right to cancel the concession, nor to forfeit the line already constructed.

"They hold the action of the Portuguese Government to have been wrongful, and to have violated the clear rights and injured the interests of the British company, which was powerless to prevent it, and which, as the Portuguese company is practically defunct, has no remedy except through the intervention of its own government.

"In their judgment, the British investors have suffered a grievous wrong in consequence of the forcible confiscation by the Portuguese Government of the line and the materials belonging to the British company, and of the security on which the debentures of the British company had been advanced; and that for that wrong Her Majesty's Government are bound to ask for compensation from the Government of Portugal. . . .

"If the Portuguese Government admit their liability to compensate the British company . . . Her Majesty's Government will admit that the amount of that compensation is a proper

matter for arbitration." (*Parliamentary Papers* [1890], *Africa*, No. 1, p. 58.)

The Government of the United States had also entered formal protest on July 1, reserving all American rights in the concession. On November 8, Mr. Blaine set forth its attitude more fully in the following instructions sent to the Minister of the United States at Lisbon:

" . . . Upon full consideration of the circumstances of the case, this government is forced to the conclusion that the violent seizure of the railway by the Portuguese Government was an act of confiscation which renders it the duty of the Government of the United States to ask that compensation should be made to such citizens of this country as may be involved. With respect to the case of Colonel MacMurdo, who is now represented by his widow, Katherine A. MacMurdo, his sole executrix and legatee, it is to be observed that by the terms of the concession the company which he was required to form was to include himself and that his personal liability was not merged in that of the company. But in any case, the Portuguese company being without remedy and having now practically ceased to exist, the only recourse of those whose property has been confiscated is the intervention of their respective governments." (Moore: *International Arbitrations*, vol. II, p. 1869.)

In his note of November 13, in reply to Lord Salisbury, the Portuguese Foreign Minister expressed confidence that the matter could be settled by direct negotiation with agents of the Portuguese company, which, according to the Portuguese contention, was still in existence. In the event of failure to reach such settlement, "His Majesty's Government would not object to submit to arbitration the point under discussion." Provision for arbitration had been made in article 53 of the contract, but if found otherwise desirable, it could be arranged for "in a different form, but, at the same time, in such a manner as may by mutual agreement secure for the parties engaged in the suit strictest impartiality." (*Parliamentary Papers* [1890], *Africa*, No. 1, p. 70.)

During the negotiations that followed, the United States took a firm stand for an international arbitration, and, as the British



Minister at Lisbon was instructed to support the view of the United States, the three parties succeeded, in the course of the year 1890, in reaching an agreement to arbitrate. Accordingly, on August 13, 1890, identic notes were sent to the President of Switzerland, asking the Federal Council to select three Swiss jurists as an arbitral tribunal to decide upon the matter in dispute. The Swiss President, in his reply of September 15, 1890, designated as arbitrators Messrs. Blaesi, Heussler, and Soldan, and indicated Berne as the place of session.

Some delay was experienced in arriving at agreement upon the protocol which was to govern the arbitration, because of the claim of the English company to represent all claimants and to receive whatever sums might be awarded. This point of difference having been removed by providing that the MacMurdo interests should be entirely controlled by the United States, the protocol was negotiated without further difficulty and signed June 13, 1891. The question at issue was submitted in article 1, as follows:

"The mandate which the three governments have agreed to refer to the arbitration tribunal is, to fix, as it shall deem most just, the amount of the compensation due by the Portuguese Government to the claimants of the other two countries, in consequence of the rescission of the concession of the Lourenço Marques Railroad, and the taking possession of that railroad by the Portuguese Government, and thereby to settle the controversy existing between the three governments on the subject." (Moore: *International Arbitrations*, vol. II, p. 1874.)

The tribunal was empowered to fix its own procedure and its award was to be "final and without appeal." The relation of the two governments to the claims of their nationals was strictly defined, it being understood that "although it appertains to the arbitration tribunal to designate the private persons or the moral persons who are entitled to the indemnity, the amount of that indemnity shall be paid by the Portuguese Government to the other two governments, in order that they may make distribution of it to the claimants."

In various memorials, opinions, and pleadings presented to the tribunal, the United States and Great Britain maintained that

the Portuguese Government had broken its contract with MacMurdo on three counts:

- (1) By its agreement with the Transvaal of May 17, 1884.
- (2) By the decree of October 24, 1888, and the decree of annulment, June 25, 1889.
- (3) By its failure to offer the road at public sale, in accordance with article 42 of the contract.

1. Under the contract, the claimant governments contended, the concessionaire had secured the sole right both to construct and to operate, which latter carried with it the right to fix rates. The tramway concession attacked these valuable privileges and made it difficult for the company to interest capital in their enterprise. There had been no reservation of rights on the part of Portugal with respect to regulation of rates, and to presume it vested otherwise than in the company would be to render the concession in large measure valueless. The Transvaal had no control over the company's rights; they were a matter for contract with the Portuguese Government, "which could not urge its obligations to the Transvaal for the purpose of diminishing the rights which it had granted to the concessionaire."

2. The cancellation of the contract, it was pointed out, was inconsistent with article 40, which had accorded to the company a period of three years, to date from the approval of plans. This approval had not been given, for the last section of nine kilometers, until February 23, 1889. Hence, on strict interpretation, three years from that date was the period fixed by the contract. This period could have been abridged by common agreement, and neither MacMurdo nor the company would have objected to any reasonable change; but the term stipulated could not be modified by the Portuguese Government alone, without consent of the other party. The decree of October 24 was arbitrary and not obligatory upon the company. Even if it were conceded that the Portuguese Government had the right to fix, of its own accord, a reasonable period for completion, the one indicated in the decree was not sufficient. On account of the rainy season, only three months out of the eight were suitable for construction. The last section of nine kilometers was the most difficult of the

whole line, and the government had taken eight months to construct it in the favorable season. Apart from this, there were at the time abnormal conditions amounting to the *force majeure* contemplated in the contract. In fine, the rescission was an act of bad faith, "an abuse of power, tyrannical and unconstitutional," rendering the Portuguese Government liable not only for damages such as are commonly awarded for simple non-execution of a contract, but for extraordinary damages of a penal character.

3. The failure to offer the road at auction still further damaged the interests of the claimants. If sold, they argued, it might have realized "a sum more than enough to pay all the indemnity claimed." The reasons for this deviation, they asserted, were, first, the rate agreement with the Transvaal company, which introduced conditions incompatible with the MacMurdo concession, and, secondly, the fixed intention of Portugal to keep for itself "a line which promised to become a source of wealth."

For these reasons the claimants asked for an indemnity "equivalent to the loss sustained and the profit foregone . . . provided always that the deprivation of this profit was the natural and direct consequence of the non-execution of the contract by the other party." In addition, the United States desired that "the indemnity to be allowed should be of an exemplary and penal character." (*Archives Diplomatiques* [1900], vol. LXXIV, p. 201.) The total amount claimed by Great Britain was £1,138,500, by the United States, £760,000 (including the value of the MacMurdo "control"), in both cases exclusive of interest, expenses, and costs.

In defense of her position, Portugal maintained that she had both the right and the duty to render the decree of rescission. The right to rescind is a sovereign right and inalienable. The Portuguese Government had expressly reserved this right by articles 42 and 45 of the contract with MacMurdo, to be exercised in certain contingencies (*supra*, p. 335), all of which had arisen. The following reasons could especially be urged to justify the rescission:

1. The spirit of the contract had been violated by the obstinate resistance to a reasonable agreement upon the question of

rates. Such an agreement was necessary, for otherwise the line would have been useless, because the cabinet at Pretoria intended to renounce its share of the undertaking, if reasonable rates were not granted. The whole railway enterprise had been entered upon with a view to discharging the obligations assumed toward the Transvaal, and the concession to MacMurdo had to be applied in the interests of both countries.

2. The right to regulate, especially in the light of international agreements, is inherent in sovereignty and could not be presumed to pass from Portugal. "Portugal could not abandon to MacMurdo her sovereign right to contract with the Transvaal in virtue of the maxims of the law of nations. The Boers had the right to demand an arrangement as to rates, and Portugal was obliged to accord it."

3. On the expiration of the contract, a large part of the necessary work on the first section of eighty-two kilometers had not been completed or had proved defective, whereas work on the last section had scarcely begun. Construction had not been undertaken or continued on a scale proportional to length, and the line could not have been opened within the period fixed or even after long delay.

4. The period assigned for completion of the road expired on June 24, 1889. Originally it was to end on October 30, 1887, and subsequent extensions did not modify the date at which the period of three years began; they were acts of grace, emanating from sovereignty and not requiring consent of the other party. The plans for the first section had been approved with a reservation as to the latter part of the line (*supra*, p. 337), and the government was bound to file plans for this section only in time to enable the whole to be completed in three years. The fact that these plans were not communicated to the company until July 27, 1887, was without significance, because the company itself was to send out an engineer to make the surveys. It was not a question of constructing nine kilometers, but of defining the frontier. The latter part of the road was easy of construction and the company had expressed itself as having nothing to object to, if the frontier was as indicated. The rainy season was no obstacle, for it could have been spent in assembling men and *matériel*, and the contractor,

Sir Thomas Tancred, had undertaken to construct the first eighty-two kilometers for the English company in a similar period of eight months.

As for the argument of *force majeure*, it was infected with the negligence of the company, for it had let almost the entire period of eight months go by without taking steps to complete the road. The damages to the first section had been due to faulty construction and could not be held to justify delay. In the words of the Portuguese argument, "all the motives alleged by the concessionaire in justification of the failure to construct the latter part of the line have been only pretexts to conceal the financial weakness of the two companies and the designs of their dictator, who wished to keep this weapon in his hands to exercise pressure upon the Transvaal." (*Archives Diplomatiques* [1900], vol. LXXIV, p. 205.)

In estimating indemnity, Portugal contended, the claimants could not demand the value of the shares in the English company, nor could a proper estimate be put upon the MacMurdo "control." The price at auction would have been the proper basis of value, but the auction had not been held because it had been forestalled by diplomatic intervention. As an equivalent settlement, however, the Portuguese Government offered to pay the sum by which it had been enriched through the possession of the road — less £28,000 already paid to the account of the British Government, and £15,000 deposited by the concessionaire with the Portuguese Government as a guarantee that engagements would be kept, and forfeited in consequence of the non-fulfillment of the contract, but later given back to the company.

Although the tribunal was constituted in 1890, the award was not rendered until March 29, 1900, owing to long delays in the conduct of the proceedings, due in part to the necessity of sending experts to Africa to make reports on questions of fact.

In the opinion of the arbitrators, the rescission of the contract was final and could not be reopened. Only the question of the amount of compensation due was before the tribunal, which had been asked to award what it considered equitable. But preliminary to this, it was necessary to determine what law was appli-

cable to the case. The Portuguese company alone could be considered as having relations with the government, the English company being merely the proprietor of a majority of shares in the former. The enterprise had never ceased to be Portuguese and the government had never allowed the concession to be transferred. Hence, Portuguese law was to be applied, provided it did not run counter to the accepted principles of international law.

The tribunal considered the question at issue to reduce itself to this: Whether or not the government was justified in the assertion that the work had not been continued on a scale proportionate to the length, or that the railway had not been completed "within the terms and periods fixed in article 40." But the answer to this depended upon the answer to a previous question: What was the period of three years in article 40 and when did it expire? There had been an approval of plans on two occasions — October 30, 1884, and February 23, 1889. From which was the period fixed for completion to date? The tribunal held that under the contract the government had to furnish plans of the entire line, to be examined by MacMurdo's engineers with a view to making modifications, if desired. But an extension of eight or nine kilometers was not a modification within the spirit of the contract. Hence, the tribunal concluded, "the concessionaire was justified in assuming in good faith that the plans, as furnished to him, represented the entire length of the road; and the Portuguese Government itself appeared to have been of this opinion, at least at the time the contract was made." The plea that the government had to await an agreement with the Transvaal with reference to the frontier before the plans for the last section could be definitely submitted, was not considered by the tribunal to be pertinent, for the government might have renounced (as it did later) the preliminary agreement with the Transvaal and have fixed the terminus of its own accord, or have left matters in suspense until a settlement with the Transvaal could be brought about. It was clear that, under article 40, the period within which the last section was to be completed did not commence to run until the plans for it had been approved — that is, from February 23, 1889; and the concession contained no clause au-

thorizing the government to fix of its own accord any period "to replace for all intents the period indicated in article 40." A new agreement should have been made regarding the final section, or, failing this, the matter should have been referred to arbitration as provided in article 53. As it was, the government had assumed the rôles of party and judge, acting in a manner "decidedly inadmissible and contrary to the text of the concession as well as to its bilateral character."

The tribunal further considered that the Portuguese Government was estopped from making any objections on the ground of defective construction, since no official statement had been issued on the matter. Besides, it was difficult to distinguish between original defects and the damage wrought by floods.

Having arrived at the conclusion that "the decree of rescission and the taking possession of the railway had not been carried out in conformity with the contract of concession," the tribunal ruled that there was but one principle of law applicable to the fixing of the compensation — that of *dommages et intérêts*, comprising, in accordance with the rules of law universally admitted, *damnum emergens* (the actual loss sustained) and *lucrum cessans* (the cessation of profit). (*Archives Diplomatiques*, vol. LXXIV, p. 214.) The action of the government, however, was illegal in form rather than in substance, for the eight months accorded could not be considered an unreasonable period. Further, the company, when asked what time it would deem sufficient, had remained silent and had even acquiesced in the period fixed. Hence, in the judgment of the tribunal, the government was relieved from damages of a penal character, "such as might have been claimed by a person who was the victim of arbitrary treatment absolutely unmerited."

The tribunal did not consider that the failure to put the road up at auction called for indemnity, diplomatic intervention having, in its opinion, absolved the government from this obligation. Nor was the Transvaal memorandum of May 17, 1884, held to be a cause of delay, assessable in damages; other reasons, especially lack of finances, were sufficient to explain the company's inaction.

On the indemnity awarded, moratory interest was allowed at the rate of 5 per cent, simple interest, in conformity with Portu-

guese commercial law, as well as with "the method of calculation generally adopted in the matter of moratory interest."

In accordance with these reasons the tribunal awarded, as follows:

"The Delagoa Bay court of arbitration, created by the arbitration convention signed at Berne, June 13, 1891, by the representatives of Portugal, the United States of North America, and Great Britain, being charged by said convention with the duty of 'fixing, as it shall deem most just, the amount of the compensation due from Portugal to the claimants of the two other countries in consequence of the cancellation of the concession of the Lourenço Marques Railway and of the taking possession of said railway by the Portuguese Government,' said court being composed of the three arbitrators designated by the Swiss Federal Council, to wit: Joseph Blaesi, at that time vice-president, and now a member of the Federal Court at Lausanne, President; Andreas Heusler, LL.D., professor of law at the University of Basel; Charles Soldan, at that time President of the Council of State of the Canton of Vaud, and now a member of the Federal Court at Lausanne; after the preparation of the case, after an examination of the papers exchanged and of the documents produced in the course of the proceedings, and also of the reports of the technical experts appointed by the court; deciding concerning the fundamental question, after hearing the arguments of the parties, says and pronounces as follows:

"1. The Government of Portugal, the defendant, is sentenced to pay to the Government of the United States of North America and that of Great Britain, the plaintiffs, in addition to the £28,000 paid on account in 1890, the sum of 15,314,000 francs in Swiss lawful money, with simple interest on said sum, at the rate of 5 per cent per annum, from the 25th day of June, 1899, to the day on which payment shall be made.

"2. This sum, after the deduction of what shall be necessary to meet the costs of the arbitration, which are payable by the plaintiffs, and, besides, the balance remaining due of the amount on which £28,000 were paid on account in 1890, shall be applied to the payment of the holders of the debenture bonds of the Delagoa Bay Company, and to the payment of other creditors of



said company, if any there be, according to the category of each.

"The plaintiffs shall prepare, to this effect, a schedule of distribution.

"The Government of Portugal shall pay to that of the United States the sum which, according to said schedule, Mrs. Mac-Murdo, who is represented by the latter government, shall be entitled to receive as a holder of first and second debenture bonds.

"It shall pay the remainder to the Government of Great Britain for the account of all the other claimants.

"3. The period of six months, fixed by the last paragraph of article 4 of the arbitration convention, shall begin to-day.

"4. As to the expenses: The expenses incurred by each party shall be paid by it. The costs of the arbitration, according to the statement to be furnished in conformity with article 5 of the convention, shall be equally borne by the three parties concerned; that is to say, one-third by each of them.

"5. The petitions of the parties, so far as they differ from the above conclusion, are rejected.

"6. An authentic copy of this award shall be transmitted, through the Swiss Federal Council, to each of the three parties concerned.

"Thus decided at a session of the court of arbitration, and issued at Berne this 29th day of March, 1900.

"BLAESI,

"A. HEUSLER,

"CHARLES SOLDAN,

"*Arbitrators.*

"BRUSTLEIN,

"*Secretary.*"

(Moore: *International Arbitrations*, vol. II, pp. 1865-99; *Parliamentary Papers* [1890], *Africa*, No. 1; *Archives Diplomatiques* [1900], vol. LXXIII, pp. 341-68; vol. LXXIV, pp. 171-227; *Foreign Relations of the United States*, 1900, pp. 901-02.)

## § 39. NATIONALITY AND PROTECTION OF VESSELS

THE DHOWS OF MUSCAT  
FRANCE AND GREAT BRITAIN

*The Permanent Court of Arbitration at The Hague, 1905*

ON the 13th of October, 1904, Lord Lansdowne, the British Foreign Secretary, and M. Cambon, the French Ambassador at London, concluded an agreement between Great Britain and France, the preamble of which was as follows:

“Whereas the Government of His Britannic Majesty and that of the French Republic have thought it right, by the Declaration of the 10th March, 1862, ‘to engage reciprocally to respect the independence’ of His Highness the Sultan of Muscat;

“And whereas difficulties as to the scope of that declaration have arisen in relation to the issue, by the French Republic, to certain subjects of His Highness the Sultan of Muscat of papers authorizing them to fly the French flag, and also as to the nature of the privileges and immunities claimed by subjects of His Highness who are owners or masters of dhows and in possession of such papers or are members of the crew of such dhows and their families, especially as to the manner in which such privileges and immunities affect the jurisdiction of His Highness the Sultan over his said subjects;

“The undersigned, being duly authorized thereto by their respective governments, hereby agree that these questions shall be determined by reference to arbitration, in accordance with the provisions of article 1 of the convention concluded between the two countries on the 14th October last, and that the decision of The Hague Tribunal shall be final.”

The Sultan of Muscat is an independent Mohammedan sovereign ruling over that part of eastern and southern Arabia known as Oman. Formerly the sultanate included Zanzibar, but in 1856 the latter became independent and later, in 1890, passed under the protection of Great Britain. As is the practice in Moslem countries, various treaties with western nations have been made

by the rulers of Muscat, in which are granted the usual privileges of extraterritoriality. As the controversy over the dhows had its origin in the conflicting interpretation given to certain of these treaties, it will elucidate the matter in dispute to enumerate the chief conventional agreements affecting the relations of Oman with the parties to the arbitration. They are as follows:

1. On November 17, 1844, was concluded a treaty of friendship and commerce between France and Muscat, whereby the nationals of each were accorded reciprocal commercial privileges on the most-favored nation basis. The provisions upon which France in large part based her case are the following:

"Art. 3. . . . The French cannot, under any pretext, be restrained of their liberty in the dominions of the Sultan of Muscat.

"Art. 4. The subjects of His Highness the Sultan of Muscat who may be in the service of the French [*au service des Français*] are to enjoy the same protection as the French themselves. . . ."

2. Similar treaties have been made at various times with Great Britain, the latest on August 19, 1891. In these are generous concessions of commercial privileges and extraterritorial jurisdiction, which the French enjoy also by reason of the most-favored-nation clause in the Treaty of 1844.

3. Other treaties have been made between Great Britain and the Sultan of Muscat with a view to the suppression of the slave trade, the Sultan undertaking to prevent his subjects from engaging in any way in such trade.

4. In 1862 a joint declaration was signed at Paris whereby Great Britain and France "deemed it advisable to make a reciprocal engagement to respect the independence" of the Sultan of Muscat and the Sultan of Zanzibar.

5. In 1890 the Brussels Conference on the slave trade adopted a general act by which the signatory powers agreed upon measures of coöperation in their efforts to suppress the traffic. The general act was ratified by France in 1892, subject, however, to reservations in which France refused to admit the right of visit and search, as applying to vessels under the French flag, or the right to detain said vessels on suspicion of engaging in the slave trade. The Sultan of Muscat did not sign the act, his engage-

ments in the matter being defined by his treaties with Great Britain.

As stated in the preamble quoted, the cause of the controversy was the issuing by French consular and colonial officials of ships' papers (*titres de navigation*) and French flags to many of the Sultan's subjects, in excess of the privileges accorded France by the Treaty of 1844. Few French citizens have resided in the sultanate and hence few of the Sultan's subjects can claim extra-territorial status by reason of having been in the service of French residents. But many owners of Arab dhows, finding the French flag convenient for the purpose of avoiding search, sought and obtained the right to fly it, especially since the Brussels Act of 1890. The result was that natives of Oman, having no domicile in French territory and no authorization to change their nationality, claimed to be under the protection of France, even when in the territories of the Sultan, and to be completely removed from his jurisdiction over their property and persons. The Sultan protested that by such practice France was withdrawing his subjects from their allegiance, and even as early as 1891, on the representations of Great Britain, M. Ribot, the French Minister for Foreign Affairs, announced that in future French Consuls would be prevented from making such grants. They continued to be issued, however, especially to the owners of dhows in Sur, a town in the sultanate of Muscat. In 1897, and again in 1899, the Sultan renewed his protests to the French Consul at Muscat, chiefly on the ground that the action of France was contrary to the Declaration of 1862, and in 1900 he ordered his subjects to refrain from accepting flags and papers from foreign governments. The subject became a matter for discussion between the French and British Governments, and in 1902 an exchange of views took place which promised a satisfactory settlement. But in 1903 some incidents occurred to reopen the controversy, especially one in which five Suris, subjects of the Sultan, were sentenced by him to a term of imprisonment for breaking quarantine. Three of these were French protégés, and the French Consul promptly claimed their release. The Sultan was upheld in his action by the British Consul and the British Government, to whom he had appealed, and after friendly representations to the French Govern-

ment, it was agreed to refer the question at issue to the Permanent Court of Arbitration.

A tribunal, constituted in accordance with the agreement, met at The Hague on July 25, 1905, under the presidency of M. Lammasch, of Austria, who was nominated by the King of Italy at the request of the parties to the arbitration. The other two members were Chief-Justice Fuller, of the United States, designated by Great Britain, and Jonkheer A. F. de Savornin Lohman, designated by France. Four sessions were held and the award was rendered August 8, 1905.

In support of its practice of "francisation," so-called, France relied in a general way upon the nature of the capitulations in Mohammedan countries, the specific Treaty of 1844, and the municipal ordinances of the French colonial administration. The origin of the francised dhows dated from the acquisition of the French colonies on the east littoral of Africa. When France took possession, many Omani owners of dhows had intimate commercial relations with that region, some of them owning plantations and engaging in commerce on their own account; but after the occupation by France, they became auxiliaries of the French merchants and shipowners. Before this time, they flew no flag, unless it was the Arab red flag, which had merely religious significance, they carried no papers, and some of them had even no personal status, for "they could not be considered as having any country but the ocean." To exercise supervision over Arab commerce as well as to suppress the slave trade more efficaciously, a maritime bureau was created at Mayotte, and, from that time on, the French flag and papers (*titres*) began to be granted to the Arab dhows, one of the earliest of these documents dating from 1845. The process of francisation was strictly regulated by the colonial authorities. A boat had to be the property of French citizens or corporations or of natives having a commercial domicile in a French colony or owning property there. Extreme circumspection had been shown in these grants of francisation and in each case the license was for a year only and had to be renewed. The owner of a dhow seeking such grant must furnish proof of his qualifications; in 1875 it was ordered that such persons must have property in the French colonies, have an honorable reputa-

tion, and be in a position to furnish all guarantees. Among others settling definitely in French colonies or emigrating without intention to return were some originally from Oman. These Omanis were in the habit of making long voyages, were polygamous, with domestic establishments in various places, but with their principal domicile in French territory, especially the Suris, who had always claimed to be independent of the Sultan of Muscat. French legislation would permit these Omani traders to acquire easily the quality of French citizens, but out of deference to the sovereignty of the Sultan, the grant had usually been one of protection instead of citizenship. However, having obtained this right to French protection, these Omanis did not, on a temporary return to Muscat, lose this right, for they were still protégés of France and possessors of real estate within French jurisdiction. This was quite within the spirit and the practice of the capitulations in force in non-Christian countries and in this specific case was clearly to be inferred from the Treaty of 1844, which admitted protection to subjects of Oman in the service of Frenchmen, which service would include all those carrying on the commercial relations that the treaty was intended to develop. Further, some of the owners of dhows had become denationalized and could not be regarded, when in Oman, as within the jurisdiction of the Sultan, for the latter had not voluntarily protested against emigration or put forward a claim to indelible allegiance. Possibly, on occasion, it might be hard to establish personal status in the absence of documents, but France had not hesitated to disavow the zeal of its officials when in the wrong. As for the accusation that the slave trade was facilitated by the francisation of the dhows, the evidence offered was largely hearsay or based upon native depositions taken under unfair circumstances. The few exceptions where there was real guilt had been punished rigorously, as in the case of two dhows in 1897 convicted of having been engaged in the transportation of slaves.

France also contended that the intervention of Great Britain in the affairs of Muscat was inadmissible, for the Declaration of 1862 was not affected. The francisation of the dhows found its sanction in the Treaty of 1844 and no attempt had been made under it to derogate from the sovereignty of the Sultan. If there

had been, he alone had the right to complain. As a matter of fact, there had been no complaint from 1863 to 1895, and it was only because Indian officials had established political influence in Muscat, that the granting of French *titres* to the dhows had suddenly been represented as a violation of the treaty with Muscat. The present Sultan was under financial pressure from Great Britain, being dependent upon the Zanzibar subsidy which was paid through the Government of India. The actual authority of the Sultan had been much restricted: Great Britain had made treaties with several of the chiefs quite independently of the Sultan; indeed, the treaties made with the Sultan himself were hard to reconcile with his independence. A British protectorate had been established in fact at Muscat, and British desire to control not only the affairs of Muscat but the commerce of the Persian Gulf and the Indian Ocean was at the base of all the difficulties that had arisen in the relations of France with Muscat.

With respect to the particular incidents that had given rise to the present arbitration, France recognized the right of the Sultan to make rules concerning sanitation, etc., provided they did not impose taxes upon French nationals or protégés. While the Sultan had complete sovereignty over his ships in his territorial waters, he had none over French ships, and hence could not delegate to any state — Great Britain, for instance — rights which did not belong to him. Nor did the Brussels Act take away any rights that France had in Omani waters. It merely affirmed the status established by the Treaty of 1844, which is always to be interpreted in the general sense of the capitulations in Moslem countries.

In reply to the contentions of France, Great Britain gave a general denial to the statements of fact. There had been no trenching upon the sovereignty of the Sultan, though assistance had sometimes been given him to put down rebellion against his authority. The fact that several Arab rulers, including the Sultan of Muscat, had made treaties giving Great Britain the right of preëmption in case of alienation did not impair their independence. Such treaties merely provided against certain contingencies; they "tend to preserve and not to destroy the state which enters into the arrangements." The so-called "trucial" chiefs with whom Great Britain had made treaties were not under the

sovereignty of the Sultan; Great Britain had dealt with them as independent rulers forty years before the Declaration of 1862.

With regard to the arguments advanced by France in support of the practice of francisation, Great Britain maintained that no warrant for it could be found in the Treaty of 1844. That treaty was on the strict basis of extraterritoriality; "it contains no surrender of the Sultan's right of police over his waters, and grants no right to France to exercise that police." Only Omanis who were actually in the service of French citizens were within the jurisdiction of French Consuls in Oman. Nor was there any validity in the other claim — put forward by M. Cambon in 1903 — that those possessing this right to fly the French flag were outside the treaty and that they were entitled to protection from the mere fact that the flag had been granted them. Such a claim "involves an assertion of the right of France spontaneously to create as many protégés as it chooses in Muscat . . . and the claim is equally applicable to the subjects of any European power in the territories of their natural sovereign — a contention which no civilized state would for a moment admit." If a foreign state were to have the unquestioned right to say just who its protégés were, it could "transfer to its protection masses of a foreign population residing in their own country, and . . . create semi-independent communities within the borders of a friendly state."

On the main question of international law involved — the import of domicile — Great Britain pointed out that domicile is not equivalent in effect to nationality. It may give "certain rights in the country in which it is acquired . . . but it gives no title to protection as a national in other countries, least of all in that of origin." The burden of proof that the domicile of origin had been lost and the quality of French protégé had been acquired lay in each case upon those making such claims, and France should see to it that such proof was furnished to the Sultan. Under the Declaration of 1862, France could not withdraw any subject of the Sultan from his allegiance, nor could she, under the Brussels Act, grant French flags or papers to any native vessel unless owned by a French citizen or by a subject of a protectorate of France. Should a native of Oman accept such papers and flags, he could



not thereby withdraw either himself, his crew, family, or employes from the jurisdiction of the Sultan when within the territories or territorial waters of Oman. Nor, should such Omani be the owner, captain, or a member of the crew of a francised dhow, could he be considered a protégé within the provision of the Treaty of 1844, for "the phrase *au service* clearly implies engagement in the capacity of a clerk or domestic or some subordinate capacity; and it cannot include all persons with whom Frenchmen happen to have contracts of a commercial nature." Merely voyaging to a French colony did not give them this right.

As for the régime of capitulations and its application to relations with Muscat, Great Britain contended that it was not possible to argue from the concessions in one Oriental country to those in another. Besides, France was seeking to extend protection, not to Christians, as the capitulations contemplate, but to Arab dhow owners.

Great Britain further maintained that these *titres*, granted with respect to a particular vessel, could not be made the object of inheritance or transfer. "The question in each case is one of personal status."

In conclusion, Great Britain submitted that "France should with all reasonable dispatch, erase from her marine registers all native vessels owned by subjects of the Sultan of Muscat, and, in coöperation with the Sultan, should take steps to obtain the surrender of all French flags and papers now held by any such subjects."

The tribunal, in rendering its decision on the first question, — that of the right to fly the French flag, — recognized that every sovereign had the right to determine who should fly his flag, and hence, as far as the general rule of law was concerned, the French Government might grant this right to subjects of Muscat. But a sovereign might be limited by treaties and, in the case of the right in question, the Brussels Act had imposed limitations for the purpose of suppressing the slave trade. France was party to this act, according to which fitters-out or owners of native vessels must be subjects or protégés of the power whose flag they claim to fly. The term protégé was not defined in the Brussels Act, but its connotation underwent a restriction in virtue of the Ottoman

law of August, 1863, implicitly accepted by powers having capitulations, as well as in virtue of the treaty between France and Morocco in 1863, to which treaty many powers have acceded. By analogy these modifications extended to other Oriental countries, save that, while in Turkey the status of protégé might be inherited, this did not obtain in Muscat, where religious conditions were different. The term protégé, therefore, according to the tribunal, now embraced the following classes only: (1) persons subjects of a country under the protectorate of the power whose protection they claim; (2) persons corresponding to the enumerated classes in the Moroccan treaties and the Ottoman law of 1863; (3) persons recognized as protégés by special treaty, as that in 1844 with Muscat, and (4) persons who had the quality of protégés before 1863 and who had not lost it subsequently.

In accordance with this reasoning, the tribunal decided the first question as follows:

- "1. Before January 2, 1892, France had the right to authorize vessels belonging to subjects of His Highness the Sultan of Muscat to fly the French flag, subject only to her own laws and administrative regulations.
- "2. Owners of dhows who, before 1892, had been authorized by France to fly the French flag, retain this authorization as long as France continues it to the grantee.
- "3. After January 2, 1892, France had no right to authorize vessels belonging to the subjects of His Highness the Sultan of Muscat to fly the French flag unless their owners or fitters-out had proved or should prove that they had been regarded and treated by France as her protégés before the year 1863."

As regards the second question before it — the nature and the extent of the immunities of Omani protégés of France when within the dominions of the Sultan of Muscat — the tribunal considered that the owners, captains, and crews of dhows authorized to fly the French flag, if natives of Oman, did not come within the purview of article 4 of the Treaty of 1844 which withdrew natives of Oman in the service of Frenchmen from the jurisdiction of the Sultan. Any such attempt to derogate from the

sovereignty of the Sultan would be in contravention of the Declaration of 1862. Hence the decision on the second point:

- "1. Dhows of Muscat that have been authorized, as indicated above, to fly the French flag, are entitled in the territorial waters of Muscat to the inviolability provided by the Franco-Muscat Treaty of November 17, 1844.
- "2. The authorization to fly the French flag cannot be transmitted or transferred to any other person or dhow, even though the latter belong to the same owner.
- "3. Subjects of the Sultan of Muscat that are owners or captains of dhows authorized to fly the French flag or that are members of the crews of such dhows or belong to their families, do not, in consequence of this fact, enjoy any right of extraterritoriality exempting them from the sovereignty, especially from the jurisdiction, of His Highness the Sultan of Muscat."

(*Recueil des Actes et Protocoles*, published by the International Bureau at The Hague; *Archives Diplomatiques*, vol. xciv, pp. 554-58; vol. xcvii, pp. 111-28; 407-29; vol. c, 233-377; *British and Foreign State Papers*, vol. xcvi, pp. 46-48; 113-18; G. G. Wilson: *The Hague Arbitration Cases*.)

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### THE CASE OF FRANCIS BOYLE (1853)

MR. MARCY, Secretary of State for the United States, on September 1, 1853, wrote to the American Consul at Hamburg:

"A copy of your dispatch in relation to the sailor Francis Boyle, under date of August 5th, addressed to the Hon. D. D. Bernard, late minister plenipotentiary and envoy extraordinary, has been transmitted by him to this Department.

"It appears, so far as the facts have been presented to the Department, that Francis Boyle, the sailor above mentioned, belonged to the crew of the ship *Talleyrand*, an American vessel, commanded by Captain Young, lying on the 2d of August in the port of the free city of Hamburg; that, on this day, the Hamburg

police went on board the said vessel, during the absence of the captain, and, under pretense of his having been concerned in a riot on shore, arrested Francis Boyle, who held at the time a protection as a citizen of the United States, and who was so designated on the crew list; that the cause assigned for the arrest was merely a pretense, since, in point of fact, it was done at the instigation of the Prussian authorities of Stettin who forwarded a requisition for the sailor, as being a Prussian by birth, and as such liable to military service; that it was alleged by the Prussian Minister, and the chief of the police at Hamburg, that his "protection" could not shield him, as it was assumed by them that the said Boyle, not having been five years in the United States, could not be a citizen thereof; and, finally, that the chief of police, after declaring that he must surrender the man to the Prussian authorities, having been deterred from so doing by the energetic remonstrances of yourself and of Captain Young, referred the matter to the syndicus, in charge of foreign affairs, by whom the sailor, after a detention of three days, was liberated and sent back on board his vessel.

"These facts, as they are thus presented, exhibit a case of so gross a violation of the rights of an American sailor, that I deem it unnecessary at this time to do more than to assure you that your active exertions to prevent the consummation of a high-handed outrage deserve and have received the strong approbation of the President.

"It is for the authorities of the so-called 'Republic and Free Hanseatic City of Hamburg' to determine how it may affect the commerce of that flourishing state, to permit their police officers to become the instruments of foreign nations in acts of violence and oppression, and upholding them in their entry, under a false pretext, on board of an American vessel, lying peacefully at their wharves engaged in commercial transactions under the sanction of solemn treaty stipulations, and arrest one of its crew, shipped as an American sailor, holding an American protection and relying upon it, and upon the flag, which floated over him, as his safeguards from all illegal acts.

"It is for the Government of the United States to determine what steps it will take to vindicate its sovereignty, violated in the

person of one under its protection, and to make known its determination to protect those who place themselves under the banner of the Republic.

"I do not deem it necessary at the present time to enter into any argument as to the question whether Francis Boyle was or was not a native-born citizen of the United States, whether he had been naturalized or had not resided five years in the United States, as contended by the Prussian authorities. The principles heretofore laid down, and acted upon by this government, in regard to the citizenship of *seamen* are plain and well settled and require no elaborate vindication. The various questions which have arisen in respect to the protection to be extended to those who have taken the incipient steps to become American citizens, do not apply to them.

"The rule laid down by the distinguished person who first held the office of Secretary of State, Mr. Jefferson, was, 'that the vessel being American shall be evidence that the seamen on board are such,' and fifty years afterwards it was restated, with no less precision by one of the most eminent of American statesmen, one of my predecessors, that 'in every regularly documented merchant vessel the crew who navigate it will find their protection in the flag which is over them.'

"This is the principle which will hereafter, certainly not less than heretofore, be maintained, in its fullest extent, by the Government of the United States."

(Moore: *Digest of International Law*, vol. II, pp. 274-75.)

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#### THE CASE OF THE MASONIC (1879)

On May 16, 1878, the American bark *Masonic*, Nichols, master, sailed from New York for Nagasaki, Japan, with a cargo of 16,500 cases of petroleum. On the 5th of the following November she put into Manila, in the Philippine Islands, in distress; but on the 12th of December, her sails and rigging having been repaired, she sailed for her destination. She again encountered heavy seas and was obliged to put back to Manila, where she arrived January 12, 1879; and as she was too badly damaged to continue on

her voyage, permission was obtained from the customs authorities to transfer her cargo to the British schooner *Mt. Lebanon*, for Nagasaki. The transfer was made while the vessels were anchored at a considerable distance from the shore and in rough water. The local officials who were put on board to supervise the transfer claimed that the cargo turned out to be 22 cases short of the 16,500 packages specified in the manifest, and for this deficiency a fine of \$100 a case, amounting to \$2,200, was imposed on the captain and denounced against the vessel. Having no funds, and deeming the fine to be wrongful, the captain made a protest to the chief officer of the customs. He was informed, in reply, that his protest could not be received till his fine was paid. The vessel was then seized and held in custody by five customs officers, though the American flag was kept flying at her mizzenmast. In course of time orders were received from her owners in New York to sell her, and the United States Vice-Consul informed the customs authorities that the bark would be sold at auction, at the same time handing them an inventory of everything on board. At first the customs authorities claimed a prior right to sell the vessel, but they subsequently informed the vice-consul that they would permit him to make the sale, holding him responsible for the proceeds. The vice-consul declined to assume any responsibility to the Manila officials, and on February 24 postponed the sale indefinitely, at the same time protesting to the governor-general against the whole proceeding. The authorities then sold the vessel themselves. On the unloading of the *Mt. Lebanon* at Nagasaki it was found that the Manila authorities had in reality made a mistake, and that there was no shortage in the number of cases.

When the Department of State was informed of these facts, it laid them before the Spanish Minister at Washington with a view to effect a prompt adjustment of the case. The minister, after reading the papers, replied that the certificate made at Nagasaki of the unloading of the *Mt. Lebanon* merely stated that there had been discharged from her 16,500 cases, and that it was to be supposed that the cases missing at Manila had been added after the transshipment of the *Masonic's* cargo at that port. There was no evidence, however, that the *Mt. Lebanon* had touched at any port

between Manila and Nagasaki; and under the circumstances the Department of State instructed the Minister of the United States at Madrid at once to bring the case to the attention of the Spanish Government, and to express an earnest desire for its early consideration and settlement. Soon afterward he was informed that the United States consular officer at Manila had been directed to protest against all the proceedings; and he was instructed to impress upon the Spanish Government not only the groundlessness of the particular prosecution, but also the principle "that vessels driven by stress of weather to seek refuge in Spanish harbors . . . should be exempted from the operation of the Spanish customs law except in so far as it is strictly necessary for the prevention of smuggling and the enforcement of sanitary regulations."

To the representations of the United States, the Spanish Government replied that, the governor of the Philippines having determined the case to be a proper one for legal proceedings, an investigation had been instituted by royal order before the Council of Administration, and was then pending, and that the continued delay in the disposition of the case was due to the refusal of the representatives of the *Masonic* to file a bond with sureties for the payment of any expenses which might be incurred by the board of examination. The United States protested against the requirement of such a bond under the circumstances; and asked, besides, that the judicial proceedings in the Philippines be discontinued, and that the case be disposed of by the authorities at Madrid. The Spanish Government, while waiving the execution of the bond, on legal grounds declined to order the discontinuance of the judicial proceedings, but directed the Manila authorities to hasten their conclusion. The Government of the United States expressed appreciation of this action, but instructed its minister at Madrid to say that an adverse decision by the authorities at Manila, after the incontrovertible evidence of innocence which had been produced by the United States, "would be regarded as so far a denial of justice to an American citizen as to require us to present an ultimate appeal in the premises directly to the supreme government at Madrid, claiming to be heard thereon, without prejudice, however, to such rights as the owner of the *Masonic* may have before the *Consejo de Estado*" (Council of State).

As a result of the administrative and judicial proceedings at Manila the decree was revoked by order of the court, which ordered restitution of the fine, and directed an indemnity to be paid to Captain Nichols for any loss and damage which he might prove that he had suffered.

On September 25, 1883, Mr. Frelinghuysen enclosed a copy of this sentence to Mr. John W. Foster, then Minister of the United States at Madrid, with an expression of the hope that in view of the completion of the judicial proceedings at Manila the case would be speedily adjusted. The matter was duly presented to the Spanish Government, but the authorities in the Philippines had sought to obtain a review of the sentence at Madrid, and the diplomatic consideration of the case was again delayed. On the 19th of September, 1884, however, Mr. Foster informed Mr. Elduayen, then Spanish Minister of State, that he had been instructed to insist that the position originally assumed by his government might be accepted, and that steps might at once be taken to adjust the claim diplomatically, and he adverted to the fact that the case had been twice presented by the President to Congress. On the 16th of October the Council of State, having completed the examination of the case, rendered a definitive decision in favor of the vessel. Mr. Elduayen thought that this should be accepted as a sufficient protection of the rights of the American claimants. They had, he said, been charged with violating the laws of Spain, to which they became subject on touching Spanish territory; the proceedings had followed the regular legal course, except that as a special favor to the United States the complainant was dispensed from giving bonds, and the case bore from the beginning to the end no indication of outrage.

Mr. Foster replied that he could neither concur in nor accept these conclusions, but that instead of attempting an argumentative answer to them he would submit a suggestion in the interest both of justice and of harmony. The United States had awaited for nearly six years the result of the judicial proceedings, in which it had finally been decided that the authorities of the Philippines had acted without law or justice. It would add another wrong to the original injustice if the American citizen whose property had been seized and confiscated should be required to go



to Manila and follow up the judgment by seeking to recover from those authorities the losses and injuries sustained by him. His means had been taken from him. Mr. Foster therefore suggested that as the decisions of the Spanish courts had established the injustice which had been done, the mode of settlement originally suggested by the United States should be adopted. Responding to this suggestion, Mr. Elduayen obtained from the Minister of Ultramar authority to settle the case in accordance with the decision of the Council of State, leaving the amount of damages to be determined by an arbitrator named by common accord. Mr. Elduayen proposed that six months should be allowed for the rendering of a decision, and that the amount awarded should be paid at Washington within six months, with interest at six per cent from the day of the decision to the day of payment. The United States accepted this proposition, with the qualification that the award should be payable in American gold. This qualification was, however, subsequently waived, it being left to the arbitrator to determine in what money the award should be paid.

For the post of arbitrator Mr. Elduayen proposed Baron Blanc, then Italian Minister at Madrid, who had at one time served as umpire in the then recent Spanish Claims Commission at Washington. This proposal the United States promptly accepted; and on the 28th of February, 1885, the Spanish Minister of State and the Chargé d'Affaires *ad interim* of the United States addressed to Baron Blanc a note inviting him to act as arbitrator. Baron Blanc, having received the permission of his government, accepted the nomination and on June 27 rendered the following award:

"The undersigned, requested by a collective note of His Excellency the Minister of State of His Majesty the King of Spain and of the Chargé d'Affaires of the United States at Madrid, dated 28th February ultimo, in the name of the respective governments, to decide in justice and equity, as arbiter, within a period not exceeding six months, the amount of the pecuniary indemnity to be paid by the Spanish Treasury to the owner of the North American vessel *Masonic* in virtue of the decreed sentence of the Council of State of Spain of October 16, 1884, and in accordance with the damages and injuries duly proved by the claimant,

has received from the high parties to form his decision the following documents: . . ."

[After enumerating the documents and discussing the cause of the disagreement between the two governments in regard to the amount of the indemnity, the arbitrator concluded:]

"The undersigned, to discharge in its entire integrity the commission with which both governments have honored him, had therefore to solve these differences of estimate by basing his decision upon the documents produced by both parties as proofs.

"The undersigned, having enlightened his conscience in the best possible way by the scrupulous verification of the proofs submitted in the arbitration, in virtue of the powers which have been conferred upon him by both governments, declares in justice and equity that in conformity with the letter and spirit of the decreed sentence of the Council of State of Spain of 16 October, 1884, according to his personal knowledge and estimation, the sum to be paid as an indemnity by the Spanish Treasury to the owner of the *Masonic*, both as capital and interest up to the date of the present decision, is \$51,674.07."

The grounds of his decision were set forth by Baron Blanc in a memoir which he sent to his own government. He afterward gave a copy of the paper to Mr. Foster, with permission to communicate it to the Government of the United States. The paper may be summarized as follows:

The arbitrator found that the value of the *Masonic* had been estimated at \$23,000 to \$25,000 at her departure from New York.

Value of the vessel	The cost of the necessary repairs had been estimated by the ship's officers at \$3,000 and by the official at Manila at \$20,000.
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The claimant in the account, presented without proofs and by way of amiable compromise, had asked \$14,500. The value as estimated by the Spanish Minister of State was \$6,000.

The arbitrator considered the claimant bound by his claim for \$14,500. Consequently an appraisement exceeding that amount could not be made against the Spanish Government. The value of the vessel was accordingly limited to and fixed at \$14,500.

Stating that the Spanish Government "recognized in principle the admissibility of proofs of ordinary and reasonable earnings of

a vessel in good condition and ready to go to sea," the arbitrator admitted the "annual payment of \$5,000 as net earnings lost from the 7th of May, 1879, that is to say, two months after <sup>Value of the earnings of the</sup> the seizure, which took place on the 7th of March, a "Masonic" time deemed necessary for the repairs to be made at Hong-Kong, up to the date of the arbitral decision."

In regard to the allowance of interest, the arbitrator, "in conformity with the sense of high equity of the declarations of His Excellency the Minister of State, inasmuch as he [the <sup>Allowance of interest</sup> latter] admits in principle the 6 per cent interest from the 7th March, 1879, on the cash capital which in equity and justice may bear interest, and inasmuch as in the offer of total indemnity made by the note of 30th May he includes the interest on the total capital which he found then proved," adjudged "the interest asked on the net earnings capitalized at the end of each year from the 7th May," and therefore did "not adjudge the supplementary interest for the value of the ship."

The arbitrator also made allowances for telegrams, stamped paper, payments to the officers of the vessel, consular fees, and lawyers' fees, with interest at six per cent where it <sup>Other items</sup> had been asked.

In regard to the item of traveling expenses between New York and Washington, Baron Blanc said: "In spite of the likelihood and moderation of the amount of \$360 asked, of the <sup>Proof of expenses</sup> difficulty of the proofs for such expenses, and of the assurance given by the Government of the United States as to the honesty of the claimant, the undersigned does not think that he can deviate from the principle not to admit what is not proved by formal documents. For this item, as it is not admitted by the Spanish Government, the undersigned does not adjudge any reimbursement."

July 20, 1885, Mr. Elduayen formally notified Mr. Foster that the Spanish Government, considering the decision of the arbitrator as binding and without appeal, would take the necessary measures to pay the sum awarded in the manner agreed upon. The money was duly paid. It was distributed by the Department of State.

(Extracted and condensed from Moore: *International Arbitrations*, vol. II, pp. 1055-69.)

**§ 40. PROTECTION OF PROPERTY AND PERSON OF NATIONALS ON THE HIGH SEAS, AND ELSEWHERE OUTSIDE THE FRONTIERS OF ANY STATE**

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**IMPRESSMENT OF SEAMEN**

It is constantly stated that the United States maintained the right of expatriation in its controversies with Great Britain concerning the impressment of seamen. This is true, but only in a very limited sense. Taking the dispute over impressment as a whole, it did not involve the crucial point of the later controversies as to expatriation. The burden of the complaint in regard to impressment, as defined in Madison's war message of June 1, 1812, was that Great Britain sought, under cover of belligerent right, to execute her municipal law of allegiance on board the ships of other countries on the high seas, where no laws could operate "but the law of nations, and the laws of the country to which the vessels belong." Precisely the same position was maintained by Webster in his correspondence with Lord Ashburton in 1842. Ships on the high seas are treated, for purposes of jurisdiction, as if they were part of the territory of the nation to which they belong. The complaint that the British Government enforced the English law of allegiance on board American vessels on the high seas was manifestly a different thing from objecting to her enforcement of the same law within British jurisdiction.

(Extract from Moore: *American Diplomacy* [New York, 1905], pp. 173-74.)

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**THE CASE OF THE VIRGINIUS (1873)**

THE *Virginus* was a merchant ship presumably entitled to fly the American flag because of her registry in the custom house at New York as the property of a citizen of the United States. For some years she had been engaged in the service of the Cuban insurgents and as such had become an object of suspicion to the Spanish authorities. In October, 1873, she left Kingston, Jamaica, ostensibly

for Costa Rica, but in reality with men and arms for Cuba. While on the high seas, she was pursued and captured by the Spanish man-of-war *Tornado* and taken to Santiago de Cuba, where fifty-three of her passengers and crew were summarily put to death on the charge of piracy. Of those executed, nineteen were of British and six of American nationality. Further executions were prevented by the arrival of a British warship at Santiago, followed a few days later by the U.S.S. *Wyoming*, whose commander, Cushing, by his vigorous protest, backed up by a threat of force, had a restraining effect upon the governor, General Burriel.

The Government of the United States made immediate demand for complete reparation, and on November 29 an agreement was arrived at between the Secretary of State and the Spanish Minister at Washington, whereby Spain stipulated to restore the *Virginus* and the survivors of her passengers and crew, and to salute the flag of the United States on the 25th of December unless "before that time Spain should prove to the satisfaction of the Government of the United States that the *Virginus* was not entitled to carry the flag of the United States, and was carrying it at the time of her capture without right and improperly," in which case the salute was to be dispensed with, "as not being necessarily requirable."

On examination instituted by the Attorney-General of the United States, it was found that the *Virginus* had been fraudulently registered and in fact belonged to residents of Cuba, and hence was not entitled to fly the American flag. In the opinion of the Attorney-General, however, this did not justify the capture. "She was as much exempt," he said, "from interference on the high seas by another power . . . as though she had been lawfully registered. . . . Spain may defend her territory and people from the hostile attack of what is, or appears to be, an American vessel, but she has no jurisdiction whatever over the question as to whether or not such vessel is on the high seas in violation of any law of the United States."

Having proved the registry to be false, Spain was not required to salute the flag, it being considered sufficient that she make declaration that no indignity to the American flag had been intended.

The *Virginus* was delivered to the United States at Bahia Honda in Cuba, but on the passage north she foundered off Cape Fear. Those of the passengers and crew that escaped execution were also handed over to the American authorities. Later, Spain paid \$80,000 to the United States in settlement of all claims arising out of the affair, in addition to indemnities paid to Great Britain on account of the British subjects executed.

The case of the *Virginus* has been much discussed by writers on international law because of the fundamental principles involved. The Spanish authorities justified the seizure and wholesale executions on the ground of piracy; but, although engaged in a filibustering expedition, the *Virginus* was guilty of no act of piracy under the law of nations, however illegal the voyage may have been under Spanish or American law. Her crew had not the *animus furandi* (intention to depredate), nor had they put themselves outside the pale of lawful authority. Hence, as Hall, in his discussion of the case, has said, "although the Spanish authorities had ample reason for watching her, for seizing her if she entered the Cuban territorial waters, and possibly even for precautionary seizure upon the high seas, no excuse existed for regarding the vessel and crew as piratical at the moment of capture."

Piracy aside, the question arises: Had Spain the right to seize the *Virginus* on the high seas in time of peace? This involves the vital right of self-defense and, corollary to it, the right of visit and search. It is conceded that a state may exercise the right of self-preservation in the case of an attack upon its territory, but sometimes the danger that threatens is less overt, though more insidious and fully as imminent, and in the face of such a danger, "to seek out and destroy the enemy" may be the most patent means of defense. If a state possesses the right of self-preservation, it must possess it in time of peace as well as of war, and "there is no greater inconvenience to be suffered by admitting that this right may be exercised on the ocean, than is constantly suffered by neutrals from an exercise of the belligerent rights of nations at war."<sup>1</sup> And to be effective this right would seem to imply "defense which prevents as well as that which repels attack."

As to the contention of the Attorney-General that the flag which

<sup>1</sup> G. T. Curtis, cited in Woolsey: *International Law* [6th ed.], p. 369.

she flew and the papers which she carried should have exempted the *Virginus* from any interference upon the high seas, it may be argued that such a line of reasoning would serve the purpose of false papers very well. If a vessel come under suspicion of being improperly documented, it may happen that the only way to ascertain the fact, in a situation requiring prompt action, would be by visit and search on the high seas even in time of peace. To this effect are the opinions of Woolsey and Hall, both of whom have discussed the case of the *Virginus*. Dana, perhaps, has gone more directly to the central fact when he points out that the *Virginus* was really owned by Spanish subjects, which fact put her under Spanish jurisdiction, for jurisdiction depends on ownership, not on a certificate of registry. As for the registry of the ship, "nations," he says, "having cause to arrest a vessel would go behind such a document to ascertain the jurisdictional fact which gives character to the document, and not the document to the fact."<sup>1</sup>

But whatever justification Spain may have had for seizing the *Virginus* on the plea of self-preservation, no excuse could be offered in palliation of the summary executions, and it was on account of these that Spain made reparation to the United States and Great Britain.

(*Foreign Relations of the United States*, 1874, pp. 922-1117; 1875, pp. 1144-1256; *British and Foreign State Papers*, vol. LXV, pp. 98-229; Moore: *Digest of International Law*, vol. II, pp. 895-903, 967, 980-83.)

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### THE CASE OF THE COSTA RICA PACKET (1888)

JANUARY 24, 1888, an Australian whaling ship, the *Costa Rica Packet*, sighted at sea a water-logged derelict prauw (native Malayan boat) of about a ton burden. Two boats were put off, which, finding goods on board the prauw, towed it alongside the ship, where there were transferred to her deck from the prauw ten cases of gin, three cases of brandy, and a can of kerosene, the

<sup>1</sup> Dana, cited in Moore: *Digest of International Law*, vol. II, pp. 981-82.

brandy and gin being more or less damaged by sea water. The prauw and its contents belonged to some natives of the Dutch East Indies; and three years afterwards, the *Costa Rica Packet* being then in the port of Ternate, Dutch East Indies, the master was arrested on a charge of theft, in having seized the prauw and maliciously appropriated the goods on it. A claim was made against the Dutch Government for his arrest and imprisonment, on the ground that the act complained of took place on the high seas outside Dutch jurisdiction. The warrant of arrest alleged that it took place not more than three miles from land, but the evidence showed that it was at least fifteen or twenty. The case was referred to Dr. von Martens, of St. Petersburg, as arbitrator, who awarded damages to the British Government, holding that "the prauw, floating derelict at sea, . . . was seized incontrovertibly outside the territorial waters of the Dutch Indies." In the course of his award he observed that "the right of sovereignty of the state over territorial waters is determined by the range of cannon measured from the low-water mark." On the facts proved, however, the question of the three-mile limit was not involved in the decision, the distance of the prauw from the shore having far exceeded the range of cannon shot.

(Taken textually from Moore: *Digest of International Law*, vol. 1, pp. 715-16.)



## CHAPTER VIII

### THE CONTROL OVER NATIONALS AND NATIONAL VESSELS, AND THE EXERCISE OF JURISDICTION OVER CERTAIN ACTS OCCURRING WITHIN A FOREIGN STATE

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#### § 41. EXERCISE OF JURISDICTION OVER REPATRIATED NATIONALS FOR CRIMES AND ACTS DONE ABROAD

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#### OFFENSES COMMITTED BY FRENCHMEN ABROAD (1910)

CERTAIN states, notably France and Italy, refuse to extradite their nationals for the trial of crimes committed in other countries. Notwithstanding the forceful arguments which other governments adduce, France continues to make the non-extradition of her nationals a fixed principle from which she will not recede. As a corollary France recognizes her obligation to punish Frenchmen for offenses committed abroad. In a recent act passed February 26, 1910, the French Government modified article 5 of the Code of Criminal Procedure to read as follows:

"Every Frenchman who has, outside of the territory of France, committed a crime punished by the French law, may be prosecuted and judgment passed upon him in France.

"Every Frenchman who, outside of French territory, has committed an act qualified by the French law as an offense (*délit*), may be prosecuted and judged in France if such act is punished by the legislation of the country where it was committed.

"The same provision applies if the accused has acquired French nationality since the commission of the crime or offense.

"Nevertheless, no prosecution shall be instituted in the case of

a crime or offense when the accused shows that he was tried abroad, and in case of conviction, has served his sentence, or been pardoned, or the sentence itself has been outlawed,

"In the case of an offense committed against a Frenchman or an alien, the prosecution cannot be begun without a complaint made by the attorney of the government. It should be preceded by a complaint of the party injured or by an official notification to the French authorities by the government of the country where the offense was committed.

"No prosecution shall be begun before the return to France of the accused, except in the case of the crimes enumerated in article 7, which follows."

(*British and Foreign State Papers* [1909-10], vol. ciii, pp. 536-37.)

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#### § 42. EXERCISE OF JURISDICTION OVER NATIONALS RESIDENT ABROAD

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### MARRIAGE OF AMERICAN WOMEN TO SUBJECTS OF GREECE (1910)

*Minister Moses to the Secretary of State*

AMERICAN LEGATION,  
Athens, January 27, 1910.

Sir: I have the honor to report that Mr. Horton, Consul-General at Athens, has called to my attention the case of Mrs. ———, of ———, a native American, married to a Greek, who now, as she writes to Mr. Horton, has deserted her and returned to his native country, where, as she suspects, he purposes to take another wife.

Both Mr. Horton's inquiries and my own have been fruitless to locate the man; and even had we been successful in this no substantial relief could have been found for Mrs. ———. The Greek Church is established by the constitution, and it and the Greek nation are practically coëval. Marriage is, therefore, by Greek law, a sacrament and not a civil contract, and has no validity unless the ceremony is performed by an orthodox priest. Ac-

cordingly, a Greek who marries in a foreign jurisdiction is at perfect freedom to regard his marriage bonds annulled upon returning to Greek jurisdiction; and Mr. Horton tells me that several cases of this character have occurred during his residence here.

There seems to be no remedy. The British Minister here tells me that his countrywomen have encountered this difficulty, and that he found himself powerless to help them. He added that a similar condition formerly existed in respect of Anglo-French marriages contracted in Great Britain, and that a special convention was necessary to remedy it. Such recourse cannot be had here by reason of the peculiar ecclesiastical situation, but I have the honor to suggest that the publication in America by the Department of the conditions outlined above might serve as some measure of protection to American women who contemplate matrimony with Greek subjects.

I have, etc.,

GEORGE H. MOSES.

(*Foreign Relations of the United States*, 1910, p. 640.)

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### THE CASE OF ARAKELYAN (1885)

ON May 16, 1885, Jacob J. Arakelyan, of Boston, wrote the following letter to the Secretary of State:

*Dear Sir:* I was about nineteen years old when I left Turkey and came to the United States. It is now nearly eighteen years that I have been in this country, where I have married an American lady, and become so permanently settled, that it is not likely I shall ever return to the East. For more than fourteen years I have been an American citizen, taxpayer, and voter. My father, Arakel Jangigian (an Armenian), with his family, resides in the town of Arabkir, Harpoot Pashalik, Turkey. His circumstances, like the majority of those in that land, are not in a prosperous condition, and I am obliged to aid him pecuniarily.

"Letters from him tell me that the Turkish Government not only continue the habit of collecting taxes from him, on my account, but to improve the roads of that vicinity (compelling the people to work without pay) they have taken my young brother

and kept him double length of the required time because of my absence."

The letter concluded with an appeal to secure the interposition of the government. Arakelyan was told that "before any measures could be taken in the premises he must furnish proof of his naturalization," and in a letter of the 29th he enclosed a certified copy of the required paper.

Whereupon Acting Secretary of State Porter sent the American Chargé at Constantinople the following instructions:

"Taxation may no doubt be imposed, in conformity with the law of nations, by a sovereign on the property within his jurisdiction of a person who is domiciled in and owes allegiance to a foreign country. It is otherwise, however, as to a tax imposed, not on such property, but on the person of the party taxed when elsewhere domiciled and elsewhere a citizen. Such a decree is internationally void, and an attempt to execute it by penalties on the relatives of the party taxed gives the person as taxed a right to appeal for diplomatic intervention to the government to which he owes allegiance. To sustain such a claim it is not necessary that the penalties should have been imposed originally and expressly on the person so excepted from jurisdiction. It is enough if it appears that the tax was levied in such a way as to reach him through his relatives.

"It is desired, therefore, that you bring the complaint of Mr. Arakelyan, as cited in the enclosed copies of his letters, to the notice of the Ottoman Government, requesting that the sum received for any taxes imposed on his relatives on his account be refunded, that the value of the road services rendered by Mr. Arakelyan's brother be returned, and that no further taxes on account of Mr. Arakelyan be imposed on his family."

On July 23 Chargé Emmet reported his interview with the Turkish Foreign Minister in regard to the case:

"His Excellency presupposes that at the time Mr. J. J. Arakelyan left his native town, Arabkir, some of his relatives entered into bonds, thereby enabling him to absent himself from home, and hence the exaction of taxes and labor on his behalf since his departure.

"If Mr. Arakelyan will take the trouble to file a petition with

the Turkish Minister in America, setting forth the facts of his case, his reason for becoming naturalized, and exhibiting the proofs of his naturalization, the minister will forward a communication to the authorities of his former home, and have his name stricken from the records, thus relieving his parents from the burden of further taxation or labor on his account. As to the restitution of moneys already disbursed, or remuneration for labor performed, His Excellency said there would be no hope for recovery. In his own words, 'We will forgive him for the future, and he must forgive the Turkish Government for the past.'

"The system of bonding would-be absentees is quite a general practice in Turkey, and will undoubtedly be found the origin of the above case."

In a letter of August 20, 1885, to Secretary Bayard, Arakelyan reviewed the facts of his case and said: "Please observe, in view of the above facts, that there have been no obstacles to my coming to this country besides my father's unwillingness to part with his son, at first, and that no one has ever entered into bonds for me that I know of, nor did I ever hear of such a custom, as I must have done had any such arrangement been entered into for me, as the Turkish Minister of Foreign Affairs presupposes."

On August 27, 1885, the Department of State transmitted this letter to the American representative and instructed him "to petition the Turkish Government for an *iradé*, so that his name may be stricken from the records, thereby relieving his parents from the burden of further taxation or labor on his account."

(*Foreign Relations of the United States, 1885*, pp. 848-49; 854-55; 860.)

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## § 43. CONSULAR OR EXTRATERRITORIAL JURISDICTION

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### THE CASABLANCA ARBITRATION

*The Permanent Court of Arbitration at The Hague, 1909*

IN 1908, in the course of French expansion in Morocco, the city of Casablanca was occupied by French troops and jurisdiction over it passed to the military authorities. During the occu-

pation, on September 25, an incident occurred which at once assumed international importance and all but precipitated a European crisis. Six deserters from the Foreign Legion, under the conduct and protection of M. Just, chancellor of the German Consulate at Casablanca, attempted to take passage on a German vessel lying off the harbor, bound for Hamburg. The deserters, three of whom were of German nationality, were promptly seized by the French officials; a scuffle ensued, blows were exchanged, and Abd-el-Kerim, a Moroccan soldier attached to the consulate, was overpowered only after much violence on both sides. In vain M. Just protested that the men were being embarked under an order signed by the German Consul; the military authorities refused to release the deserters, though Abd-el-Kerim was given his freedom as being a German protégé.

The German Consul at Casablanca made immediate protest to the French Consul, and on October 10 this was followed up by the demand of the German Government for the release of the deserters and for an apology for injury to the consular prerogatives. France refused to discuss the matter on this basis, but eagerly adopted a German suggestion of arbitration. In spite of military tension, and chiefly through the good offices of the Emperor of Austria, an agreement was arrived at between the two governments, submitting the whole question to arbitration, each party undertaking "to express its regrets for the acts of its agents in accordance with the award to be rendered by the arbitrators upon the facts and upon the question of law." Accordingly, M. Renault, for France, and M. Kriege, for Germany, were empowered to fix upon the details of the arbitral procedure to be followed, and on November 24 a *compromis* of nine articles was signed at Berlin by representatives of the two governments. It was provided that there should be five arbitrators, chosen from the Permanent Court of Arbitration at The Hague within fifteen days of the date of the *compromis*, that copies of the respective cases and counter-cases should be furnished the tribunal on specified dates, that either the French or German language might be employed, and that, in matters not otherwise provided for, the Hague Convention of 1907 was to govern. After the tribunal had decided the questions of law and of fact, it was to determine

the situation of the individuals about whom the dispute had arisen.

As its representatives upon the tribunal, Germany designated M. Kriege and M. Fusinato, an Italian, while France designated M. Renault and Sir Edward Fry, a British jurist. These four chose as fifth member and President *ex officio* M. von Hammarskjöld, of Sweden. The tribunal met for the first time on May 1, 1909, and held six sessions in all. Its award was rendered on May 22, 1909.

The question at issue stood out very clear: Which was paramount, in the event of conflict, the authority of a military occupant or the consular jurisdiction of the capitulations? The French case maintained the urgent and exclusive nature of military necessity, the German case, the exceptional status of extraterritoriality and its complete freedom from any modification or supersession not concurred in by the power possessing it.

It was pointed out in the French argument that two questions were before the consideration of the tribunal:

- (1) Were the deserters entitled to the protection of the German Consul as against the military authorities?
- (2) Had the consular officials been treated contrary to international law, and if so, upon whom was the responsibility?

Of the six deserters, three were non-Germans, and in extending his protection to them the German Consul had been guilty of an abuse of power, admitting of no argument; "such an act is contrary to the law of nations which restricts the consular protection to nationals or protégés of the consul's state." A fourth deserter was a native of Alsace-Lorraine, who had become naturalized in France, but inasmuch as Germany still considered him a German, the French case did not seek to establish for him a status different from that of the other two about whose German nationality there was no question. Strictly, therefore, the point at issue was the right of the German Consul to lend his aid and protection to the three Germans. In this he had acted counter both to the regulations of the German consular establishment and to the principles of international law. The consular regulations were clear as to who were not entitled to protection, and among others were those

employed, without authorization, in the civil or military service of a foreign state. The precedents supported this contention, notably the similar instances of desertion at Port Said in 1895 and at Cairo in 1900, in both of which cases German Consuls had declined to extend official assistance to their compatriots. But, besides, the German Consul should be censured in the name of international law, for he had violated rights which were always recognized as belonging to a military occupant of foreign territory. The immunity from local jurisdiction attaching to the latter implied not only that the troops were still under the military law of their state, but that all offenses against the army of occupation came under the same jurisdiction. Positive law in most states was clear on the point, as well as international practice and military legislation. For instance, the military penal code of Germany, of June 22, 1872, provided that "every foreigner or German, who, in foreign territory occupied by German forces, commits against German troops or their allies or against an authority established by order of the Emperor an offense provided for in the laws of the German Empire, shall be punished in the same manner as if he had committed the offense in German federal territory."

It followed that, in countries like Morocco, there resulted from the fact of military occupation a state of affairs incompatible with the complete exercise of consular jurisdiction over foreign subjects in occupied territory. The authority of the army superseded the territorial jurisdiction in western countries; still more so in countries of capitulations. If the Sultan, the sovereign of the occupied territory, was obliged to yield his rights of jurisdiction, those who derived from him their privileges of extraterritoriality ceased to exercise their jurisdiction also in cases of conflict with the rights of the occupant, though in the occupation of Casablanca all consular privileges had been maintained except where military security demanded otherwise. German law recognized this paramountcy of military occupation in its provisions for consular jurisdiction (Law of the Empire, April 7, 1900), while ample precedent for it could be found in recent events in Tunis, Crete, and especially in Samoa, where the German Government itself, in the course of military operations in 1889, had acted in the same manner with respect to desertion as had the French at Casablanca. In the



Orient, states sometimes voluntarily gave up jurisdiction in favor of military authorities of other states; the United States and Great Britain had agreed to this effect in China, Japan, and Siam as regards British subjects enlisted in the American navy, on the principle that "all persons in the service of a foreign state are subject, during the period of service, to the exclusive jurisdiction of that state."

On a personal view of the case, the deserters had entered the French service by regular contract, a contract of public law, which the legionaries could not break at will and which in any case was governed by French law. This personal law was exclusive and consular protection could not interpose itself between military authority and its soldiers of foreign nationality. Nor could it be maintained that the deserters, having broken the contractual bond, forthwith came under the exclusive jurisdiction of their own state, in this case recovering the benefit of extraterritoriality; for, not to mention other objections, this would make possible, with impunity, attempts on the part of the deserters to corrupt those legionaries that remained loyal.

As to the questions of fact, the French argument maintained that there was evidence that the deserters had been assisted by a plot fomented from without. That they had been assembled singly, showed premeditation. The consul must have had knowledge that he was departing from his consular functions, for he had had the deserters concealed and did not mention their quality or nationality in the order signed. The omission of words in a safe-conduct was serious and, though M. Just was primarily responsible for this, the consul himself was at fault in lending his authority and signature. It was no justification to say that his attention had not been drawn to the changes in the safe-conduct, and that he had not read it; there was not much to read and omissions were easily noticeable.

The treatment of the consular officials was justified by France on the ground of self-defense. The inviolability of public ministers (including consuls in countries of capitulations) was not absolute, but was subject to qualification in the case of acts provocative of measures of defense or precaution. In the Casablanca affair the German officials had been the aggressors, while the French sol-

diers and marines "had only employed the right of legitimate defense against Abd-el-Kerim and M. Just and had done no violence to the consular inviolability."

In its version of the facts, the German argument repelled the statement that the consulate had encouraged desertion. On the contrary, its aid had been solicited at various times by Germans who had left the Foreign Legion, and this had been given to the extent of providing lodging and securing transportation to Germany for them on condition that they repaid expenses later. In order to regularize the embarkations, the consul had adopted a special form of safe-conduct and had delegated the secretary of the consulate, M. Just, to supervise them. On September 22, a German journalist, Sievers, asked the consular protection for three German subjects, which was accorded after the consul had satisfied himself that the claims to German nationality were genuine. But in the safe-conduct issued by M. Just the number was stated as six and the words "of German nationality" were omitted. The consul signed the order without noticing the exact number to be embarked or the omission in the text. This error on the part of M. Just was freely confessed by Germany, but in no event could it have the effect of withdrawing the three German deserters from the consular protection.

On the question of law Germany maintained that German nationality, according to the Law of 1870, was not lost by enlistment in the military service of a foreign state. Under the Convention of Madrid (1880) and the Act of Algeciras (1906), Germany enjoyed in Morocco the rights of the most-favored nation, which included, among others, the right of consular jurisdiction as possessed by Great Britain under treaty with Morocco in 1856. Hence the German deserters, once away from the French army, clearly passed over to German jurisdiction, which, as administered by the consul in Morocco, was exclusive of all other. The presence of French troops in Casablanca did not alter the situation. The Act of Algeciras had not accorded to France any right of sovereignty over Morocco and the independence of the Sultan and the integrity of his state ought to be safeguarded. The operations in which the French were engaged were only of the nature of police measures with a view to tranquilizing the country, and that France

had no intention of making any political changes was stated in a note communicated to the German Consul at Casablanca by the French Consul in September, 1908. Pacific occupation did not have the same juridical effects as military occupation in the course of a war, duly declared, just as a pacific blockade differed in its legal consequences from a war blockade. The authority of Morocco had not been contested by France, as it would have been in case of war. In consequence, the powers of the occupant were no greater than those of the occupied state, and hence consular jurisdiction remained unchanged.

Further, it was not a certainty that theories of military occupation applied to countries with capitulations when subjects of third states were concerned. France had no more rights in Morocco than Germany had in Samoa in 1889, when Great Britain and the United States stood upon their rights of extraterritorial jurisdiction and Germany acquiesced in their claims. Similar instances of the independence and integrity of consular jurisdiction in the face of military measures were furnished by events in Crete in 1897 and in China in 1900. Hence, German extraterritoriality remaining intact, German subjects, when they deserted from the Foreign Legion, came under the jurisdiction of their consul. It was like passing beyond a frontier — the former jurisdiction ceased and another took its place. In fully civilized states this was the territorial power, in countries of capitulations, the jurisdiction of the consul. This was evident from French precedent itself, as at Port Said, when French troops deserted on the way through the canal, as well as in China in 1905, when the French Minister recognized that German authorities had jurisdiction over French deserters of German nationality on Chinese territory.

Viewing the military service of the legionaries as a contract, the German contention was that it was entirely a matter of private law, having no effects of public law except in France itself — certainly none in Germany or in Morocco. Such a contract was void for a German so long as he had military obligations toward Germany. It was very serious if the legionary still owed service to a German corps. Any contract that annulled German military obligations was contrary to public policy and might give rise to serious complications; for example, the contractant might be re-

garded as a traitor, if fighting against his native land. Even if the contract was legal, the legionaries did not always remain under jurisdiction to the end of the contract. The military authority was effective only within the limits of French territory or of French extraterritorial privileges in so far as they related to a French corps in a foreign country. And the military extraterritoriality applied only to the troop as such. The soldier, as an individual, participated in this privileged status only to the extent that he belonged effectively to the corps. Once the connection was broken, he passed beyond its jurisdiction.

The French contention that the military authorities had been subjected to the aggression of the consular officials was inconsistent on the face of it; there had been but two unarmed men as against a large number of armed soldiers; and even if M. Just had used violence, it could be justified by reason of his official relations with the three German deserters. It was especially serious to affront a consular official in public and before the native population, for it prejudiced the standing of all consular establishments in Morocco and worked detriment to the principles of extraterritoriality so essential to communities under the régime of capitulations.

Accordingly, it was requested of the tribunal that its award direct the French Government to release the three German deserters and to place them at the disposal of the German Government.

The decision in the Casablanca case was, in a legal sense, somewhat unsatisfactory, for it did not take a pronounced position in favor of either of the conflicting principles involved. It showed evidence, in its balanced reasoning, that a political compromise was sought rather than a judicial ruling. The substantial results of the decision, however, were in favor of France, for it did not call upon her to surrender the deserters to Germany. After indicating the conflict of jurisdiction and pointing out that France had not made known the composition of the expeditionary force nor had Germany protested against the employment of German legionaries in Morocco, the tribunal proceeded to exonerate the German Consul from any intentional error in signing the safe-conduct, but declared that the secretary of the consulate "ex-

ceeded the limits of his authority and committed a grave and manifest violation of his duties." The tribunal was further of opinion that "the actual situation should have been respected by the French military authority as far as possible," leaving the deserters "in sequestration at the German Consulate until the question of the competent jurisdiction had been decided." Such a course of action would have preserved consular prestige and given opportunity for more pacific measures of settlement. For all of these reasons the tribunal declared and decided as follows:

"It was wrong and through a grave and manifest error that the secretary of the Imperial German Consulate at Casablanca attempted to have embarked, on a German steamship, deserters from the French Foreign Legion who were not of German nationality.

"The German Consul and the other officers of the consulate were not responsible in this regard; however, in signing the safe-conduct which was presented to him, the consul committed an unintentional error.

"The German Consulate did not, under the circumstances of the case, have the right to grant its protection to the deserters of German nationality; however, the error of law committed on this point by the officials of the consulate cannot be imputed against them either as an intentional or an unintentional error.

"It was wrong for the French military authorities not to respect, as far as possible, the actual protection exercised over these deserters in the name of the German Consulate.

"Even leaving out of consideration the obligation to respect consular protection, the circumstances did not warrant, on the part of the French soldiers, either the threat made with a revolver or the continuation of the blows inflicted upon the Moroccan soldier of the consulate.

"There is no occasion for passing on the other charges contained in the conclusions of the two parties."

(*Revue Générale de Droit International Public*, vol. xvii, pp. 326-407; *American Journal of International Law*, vol. iii, pp. 176-78; 755-60; G. G. Wilson: *The Hague Arbitration Cases*.)

**§ 44. EXERCISE OF JURISDICTION OVER ALIENS FOR ACTS  
DONE WITHIN ANOTHER STATE**

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**CUTTING'S CASE (1886)**

IN his instructions of July 20, 1886, to Mr. Jackson, Minister to Mexico, Secretary Bayard said:

"After reading the telegrams and dispatches (copies of which I enclose for your information) of Mr. J. Harvey Brigham, United States Consul at El Paso, Mexico, and also your No. 266, dated the 8th instant, relating to the case of Mr. A. K. Cutting, I telegraphed you on the 19th instant as follows:

"'You are instructed to demand of the Mexican Government the instant release of A. K. Cutting, a citizen of the United States, now unlawfully imprisoned at Paso del Norte.'

"By the documents before me the following facts appear:

"On June 18 last A. K. Cutting, a citizen of the United States, who for the preceding eighteen months had been a resident, 'off and on,' of Paso del Norte, Mexico, and as to whose character for respectability strong evidence has been adduced, published in a newspaper of El Paso, Texas, a card commenting on certain proceedings of Emigdio Medina, a citizen of Mexico, with whom Mr. Cutting has been in controversy. For this publication Mr. Cutting was imprisoned on the 22d of June last, at El Paso del Norte, in Mexico. Such a publication would not, even had it been made in Mexico, be the subject of criminal prosecution in that country, according to the Roman common law there in force, nor of any adverse governmental action, unless, perhaps, for the single purpose of requiring security in some small sum to keep the peace. But the paper was not published in Mexico, and the proposition that Mexico can take jurisdiction of its author on account of its publication in Texas is wholly inadmissible and is peremptorily denied by this government. It is equivalent to asserting that Mexico can take jurisdiction over the authors of the various

criticisms of Mexican business operations which appear in the newspapers of the United States. If Mr. Cutting can be tried and imprisoned in Mexico for publishing in the United States a criticism on a Mexican business transaction in which he was concerned, there is not an editor or publisher of a newspaper in the United States who could not, were he found in Mexico, be subjected to like indignities and injuries on the same ground. To an assumption of such jurisdiction by Mexico neither the Government of the United States nor the governments of our several states will submit. They will each mete out due justice to all offenses committed in their respective jurisdictions. They will not permit that this prerogative shall in any degree be usurped by Mexico, nor, aside from the fact of the exclusiveness of their jurisdiction over acts done within their own boundaries, will they permit a citizen of the United States to be called to account by Mexico for acts done by him within the boundaries of the United States. On this ground, therefore, you will demand Mr. Cutting's release.

"But there is another ground on which this demand may with equal positiveness be based. By the law of nations no punishment can be inflicted by a sovereign on citizens of other countries unless in conformity with those sanctions of justice which all civilized nations hold in common.

"Among these sanctions are the right of having the facts on which the charge of guilt was made examined by an impartial court, the explanation to the accused of these facts, the opportunity granted to him of counsel, such delay as is necessary to prepare his case, permission in all cases not capital to go at large on bail till trial, the due production under oath of all evidence prejudicing the accused, giving him the right to cross-examination, the right to produce his own evidence in exculpation, release even from temporary imprisonment in all cases where the charge is simply one of threatened breach of the peace, and where due security to keep the peace is tendered. All these sanctions were violated in the present case. Mr. Cutting was summarily imprisoned by a tribunal whose partiality and incompetency were alike shown by its proceedings. He was refused counsel; he was refused an interpreter to explain to him the nature of the charges brought

against him; if there was evidence against him it was not produced under oath, with an opportunity given him for cross-examination; bail was refused to him; and after a trial, if it can be called such, violating, in its way, the fundamental sanctions of civilized justice, he was cast into a 'loathsome and filthy' cell, where, according to one of the affidavits attached to Mr. Brigham's report, 'there are from six to eight other prisoners, and when the door is locked there are no other means of ventilation' — an adobe house, almost air-tight, with a 'dirt floor;' he was allowed about '8½ cents American money for his subsistence;' he was 'not furnished with any bedding, not even a blanket.' In this wretched cell, subjected to pains and deprivations which no civilized government should permit to be inflicted on those detained in its prisons, he still languishes, and this for an act committed in the United States, and in itself not subject to prosecution in any humane system of jurisprudence, and after a trial violating the chief sanctions of criminal procedure.

"These circumstances you will state as giving an additional basis, a basis which if it be established this government will not permit to be questioned, for the demand for Mr. Cutting's immediate release."

On July 24, the Mexican Minister communicated a copy of article 186 of the Mexican Penal Code authorizing punishment for the offense of which Cutting was accused.

Although Cutting had been previously released, President Cleveland, in his annual message of December 6, 1886, said in criticism of the Mexican contention:

"The admission of such a pretension would be attended with serious results, invasive of the jurisdiction of this government, and highly dangerous to our citizens in foreign lands; therefore I have denied it, and protested against its attempted exercise, as unwarranted by the principles of law and international usages.

"A sovereign has jurisdiction of offenses which take effect within his territory, although concocted or commenced outside of it; but the right is denied of any foreign sovereign to punish a citizen of the United States for an offense consummated on our soil in violation of our laws, even though the offense be against a subject or citizen of such sovereign. The Mexican statute in question makes



the claim broadly, and the principle, if conceded, would create a dual responsibility in the citizen, and lead to inextricable confusion, destructive of that certainty in the law which is an essential of liberty."

In a note to the Mexican Chargé, of November 1, 1887, Secretary Bayard reviewed the case, and referred to the action of the French Government in 1852, when, because of representations made by the British Government, a proposed law to exercise jurisdiction over offenses against Frenchmen committed abroad by aliens was withdrawn. In this connection Mr. Bayard said: "Sincerely desirous of maintaining with the Government of Mexico the most cordial and friendly relations, I cannot think that that end could be more signally promoted than by that government following the highly honorable example of France in removing from the amicable relations of the two countries a law which stands as a constant menace to their continuance."

In regard to the objection on the ground of the inability of the federal authorities to interfere, the Secretary of State instanced the case of McLeod when "Congress amended the law relating to the issuance of writs of *habeas corpus* so as to facilitate the performance by the Government of the United States of its international obligations." These arguments in the note were accompanied by the exhaustive report prepared by John Bassett Moore on extra-territorial crime.

The difference was satisfactorily settled some years later by a provision in the extradition treaty of February 22, 1899, between the United States and Mexico, by which the contracting parties agreed, except in the case of the crimes of "embezzlement or criminal malversation of public funds committed within the jurisdiction of either party by public officers or depositaries, . . . not to assume jurisdiction in the punishment of crimes committed exclusively within the territory of the other."

(Extracted and condensed from Moore: *Digest of International Law*, vol. II, pp. 228-42.)

§ 45. TAXATION OF PROPERTY SITUATED ABROAD

(See *Case of Arakelyan*, p. 375, and *Case of Mrs. Honey*, p. 273.)

§ 46. CONTROL OVER VESSELS FLYING THE NATIONAL FLAG

REGINA v. LESLEY (1860)

THE judgment of the court, delivered January 28, 1860, sufficiently states the case:

"In this case the question is, whether a conviction for false imprisonment can be sustained upon the following facts:

"The prosecutor and others, being in Chile, and subjects of that state, were banished by the government from Chile to England.

"The defendant, being master of an English merchant vessel lying in the territorial waters of Chile, near Valparaiso, contracted with that government to take the prosecutor and his companions from Valparaiso to Liverpool, and they were accordingly brought on board the defendant's vessel by the officers of the government, and carried to Liverpool by the defendant under his contract. Then, can the conviction be sustained for that which was done within the Chilean waters? We answer no.

"We assume that in Chile the act of the government towards its subjects was lawful; and, although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects thereof.

"We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the government, and under its authority. In *Dobree v. Napier*,<sup>1</sup> the defendant, on

<sup>1</sup> 2 Bing. N. C. 781.

behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of Portugal, in her own territory, had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman seizing an English vessel, could justify the act under the employment of the Queen.

"We think that the acts of the defendant in Chile become lawful on the same principle, and therefore no ground for the conviction.

"The further question remains, can the conviction be sustained for that which was done out of the Chilean territory? And we think it can.

"It is clear that an English ship on the high seas, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil. In *Regina v. Sattler* (Dears. & Bell's C. C. R. 525), this principle was acted on, so as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea: the same principle has been laid down by foreign writers on international law, among which it is enough to cite Ortolan (*sur la Diplomatie de la Mer*, liv. 2, cap. 13).

"The Merchant Shipping Act (17 & 18 Vict. c. 104, s. 267) makes the master and seamen of a British ship responsible for all offenses against property or person committed on the sea out of Her Majesty's dominions as if they had been committed within the jurisdiction of the Admiralty of England.

"Such being the law, if the act of the defendant amounted to a false imprisonment he was liable to be convicted. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship, and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chile, yet that justification ceased when he passed the line of Chilean jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment.

"It may be that transportation to England is lawful by the law of Chile, and that a Chilean ship might so lawfully transport Chilean subjects; but for an English ship the laws of Chile, out of the state, are powerless, and the lawfulness of the acts must be tried by English law.

"For these reasons, to the extent above mentioned, the conviction is affirmed.

*"Conviction confirmed accordingly."*

(Bell's *Crown Cases*, Court of Queen's Bench and the Courts of Error [London, 1861], pp. 232-35.)

### THE TCHERNIAK AFFAIR (1907)

ERNEST LÉMONON (under Notes in the *Revue de Droit International et de Législation Comparée* [1907], 2d series, vol. IX, pp. 316-20) relates an interesting case from which is taken the following abstract of the facts:

February 15, 1907, a Swedish merchantman, *Olof Wyk*, bound for Sweden, touched at the port of Antwerp having on board four dead. The vessel intended to make but a short stay at Antwerp, but because of circumstances consequent upon the death of the four passengers she could not leave before the 18th.

Upon the vessel's arrival at Antwerp, one Élie Tcherniak, brother of one of the deceased, the French revolutionist Tcherniak, notified the Antwerp authorities that his brother had been assassinated by a person unknown. The Antwerp authorities refused to act upon the complaint because the place where the alleged crime was committed was aboard a Swedish ship upon the high seas. They considered that the Swedish Consul was the authority competent to investigate the matter, not the Belgian officials. Following this advice, Élie Tcherniak laid his complaint before the Swedish Consul, who then asked the Belgian authorities to help him conduct the investigation. Acting upon a commission rogatory, the investigating magistrate, Caroly, of Antwerp, appointed four experts, two doctors of medicine and two chemists, to make an autopsy of the four bodies and in particular of the body of Tcherniak, for the purpose of discovering the cause

of the deaths. The ship's officers were unable to give any precise information in regard to the circumstances attending the death of the four passengers, and the principal effort of the investigation was to decide if the deaths had been caused by murder or if there had been, on the contrary, some simple accidental cause. Certain Socialists in Belgium made great clamor about the affair and lost no time in proclaiming that Tcherniak, who had been expelled from Russia as a revolutionist and had taken refuge in France and then in England, had certainly been assassinated on board the *Olof Wyk* at the instigation of the Russian police and the supporters of the Tsar, who were terrified at the prospect of his return to Sweden.

On the part of the public, there was, however, a general disposition to await the result of the inquest before forming an opinion. After the experts had made the autopsy of the bodies and visited the *Olof Wyk*, they eliminated the hypothesis that the deaths were due to crime and concluded, as far as concerned Tcherniak, that death had been due to carbon monoxide, the poisonous fumes of which had been given off by a defective heating apparatus. They asked that a fifth expert and engineer be added to their number for the purpose of examining the technical arrangements of the vessel.

## CHAPTER IX

### THE COÖPERATION OF STATES FOR A RECIPROCAL BENEFIT

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#### § 47. RECIPROCITY AS A BASIS OF TREATMENT BETWEEN GOVERNMENTS

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#### THE SANTA CRUZ

*The High Court of Admiralty, 1798*

THIS was a case of a Portuguese vessel taken by the French, and retaken by English cruisers, after being a month in the possession of the enemy: it was the leading case of several of the same nature, as to the general law of recapture between England and Portugal. . . .

*Sir W. Scott:* "These are cases of Portuguese ships or cargoes, eight in number, which have been recaptured at different times by British cruisers.

"As far as the dates of the recaptures are material, they are to be distinguished under three periods: The first vessel was recaptured before the month of December 1796, when an ordinance on the subject of recapture passed in Portugal; the second was retaken between the months of December 1796 and May 1797, when another ordinance took place, more expressly respecting the property of allies recaptured from the enemy; the rest may be stated generally, without farther distinction, to have been taken subsequently to the 9th of May 1797. It is necessary to distinguish these dates, as it is said the difference of date may affect the application of the general principle, whatever that may be, to the particular cases.

"They are cases of very considerable value, of much importance, and of no mean difficulty in many respects; under a choice

of cases, they are not such as I should particularly wish to determine; but they devolve on me in the regular course of my duty; and I am bound to decide them according to my own best informed apprehensions of law and justice, of the general law of nations, as it has been understood and administered in the British Courts of Admiralty.

"In the arguments of the council, I have heard much of the rules which the law of nations prescribes on recapture, respecting the time when property vests in the captor; and it certainly is a question of much curiosity, to enquire what is the true rule on this subject; when I say, *the true rule*, I mean only the rule to which civilized nations, attending to just principles, ought to adhere; for the moment you admit, as admitted it must be, that the practice of nations is various, you admit there is no rule operating with the proper force and authority of a general law.

"It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hours possession; or it might be the rule of bringing *infra prasidia*; or it might be a rule requiring an actual sentence of condemnation. Either of these rules might be sufficient for general practical convenience, although in theory perhaps one might appear more just than another. But the fact is, there is no such rule of practice; nations concur in principle indeed, so far as regards firm and secure possession. But their rules of evidence respecting the possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion of European states more distinctly agreed, on any principle, as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it.

"That obligation could arise only from a reciprocity of practice in other nations; for from the very circumstance of the prevalence of a different rule among other nations, it would become not only lawful, but necessary, to that one nation to pursue a different conduct: for instance, were there a rule prevailing among other nations, that the immediate possession and the very act of capture should divest the property from the first owner, it would be ab-

surd in Great Britain to act towards them on a more extended principle; and to lay it down as a general rule, that a bringing *infra prasidia*, though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right; for the effect of adhering to such a rule would be gross injustice to British subjects; and a rule, from which gross injustice must ensue in practice, can never be the true rule of law between independent nations; for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety therefore is on one side, and real practical justice on the other, the rule of substantial justice must be held to be the true rule of the law of nations between independent states.

"If I am asked, under the known diversity of practice on this subject, What is the proper rule for a state to apply to the recaptured property of its allies? I should answer, that the liberal and rational proceeding would be, to apply in the first instance the rule of that country to which the recaptured property belongs. I admit the practice of nations is not so; but I think such a rule would be both liberal and just: to the recaptured, it presents his own consent, bound up in the legislative wisdom of his own country; to the recaptor, it cannot be considered as injurious. Where the rule of the recaptured would condemn, whilst the rule of the recaptor prevailing amongst his own countrymen would restore, it brings an obvious advantage; and even in the case of immediate restitution, under the rules of the recaptured, the recapturing country would rest secure in the reliance of receiving reciprocal justice in its turn.

"It may be said, What if this reliance should be disappointed? Redress must then be sought from retaliation; which, in the disputes of independent states, is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution: this will be their ultimate security, and it is a security sufficient to warrant the trust. For the transactions of states cannot be balanced by minute arithmetic; something must on all occasions be hazarded on just and liberal presumptions.

"Or it may be asked, What if there is no rule in the country of the



recaptured? I answer, first, this is scarcely to be supposed; there may be no ordinance, no prize acts immediately applying to recapture; but there is a law of habit, a law of usage, a standing and known principle on the subject, in all civilized commercial countries: it is the common practice of European states, in every war, to issue proclamations and edicts on the subject of prize; but till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of their prize acts. But secondly, if there should exist a country in which no rule prevails, — the recapturing country must then of necessity apply its own rule, and rest on the presumption, that that rule will be adopted and administered in the future practice of its allies.

“Again, it is said that a country applying to other countries their own respective rules will have a practice discordant and irregular. It may be so; but it will be a discordance proceeding from the most exact uniformity of principle; it will be *idem per diversa*. It is asked also, Will you adopt the rules of Tunis and Algiers? If you take the people of Tunis and Algiers for your allies, undoubtedly you must; you must act towards them on the same rules of relative justice on which you conduct yourselves towards other nations. And upon the whole of these objections, it is to be observed, that a rule may bear marks of apparent inconsistency, and nevertheless contain much relative fitness and propriety: a regulation may be extremely unfit to be made, which yet shall be extremely fit, and shall indeed be the only fit rule, to be observed towards other parties who have originally established it for themselves.

“So much it might be necessary to explain myself on the mere question of propriety; but it is much more material to consider what is the actual rule of the maritime law of England on this subject. I understand it to be clearly this: that the maritime law of England having adopted a most liberal rule of restitution on salvage, with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle: in such a case it adopts their rule, and treats them according to their own measure of justice. This I consider to be the true statement of the

law of England on this subject: it was clearly so recognized in the case of the *San Iago*, a case which was not, as it has been insinuated, decided on special circumstances nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found amongst the manuscript collections of a very experienced practitioner in this profession (Sir E. Simson), which records the practice and the rule as it was understood to prevail in his time. 'The rule is: that England restores, on salvage, to its allies; but if instances can be given of British property retaken by them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule.'

"I conceive this principle of reciprocity is by no means peculiar to cases of recapture; it is found also to operate in other cases of maritime law: at the breaking out of a war it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores.

"It is a principle sanctioned by that great foundation of the law of England, Magna Charta itself; which prescribes, that at the commencement of a war the enemy's merchants shall be kept and treated as our own merchants are treated in their country.

"In recaptures, it is observable, the liberality of this country outsteps its caution; it restores on salvage without inquiry, till it appears that the ally pursues a different rule. It may be said, there may be inequality and hazard in this prompt liberality, and we may restore while the ally condemns, and so the fact has been; for it is not to be denied that before the case of the *San Iago* had introduced a more accurate knowledge of the Spanish law, restitutions of Spanish property on recapture had passed as of course; the more accurate rule however is that which I have laid down.

"In the present state of hostility (if so it may be called) between America and France, the practice of this court restores American property on its own rule, without inquiring into the practice of America. It acts on the same principle towards Danes, and Swedes, and Hamburgers, in the ambiguous state in which the rapine of France has placed the subjects of these governments. Towards Portugal then undoubtedly a less liberal treatment would not be

observed; connected by long alliance, by ancient treaties, by mutual interests and common dangers, if Portugal forfeits the benefit of a rule which has been before observed as a general rule, it can be only on this ground that the courts of that country have applied a different rule to the property of British subjects. The question then for the court to determine will be simply this: Has Portugal applied a different rule to British property taken by the enemy, and coming out of their hands into the possession of Portuguese subjects?"

[After discussing the bearing upon the case of conventional relations between the two countries and discussing the value of the evidence submitted and upon whom rested the burden of the proof, the eminent judge states:]

"I consider myself, therefore, justified to conclude, that the law of Portugal established twenty-four hours' possession by the enemy to be a legal divestment of the property of the original owner; and also, that it would have applied the same rule to the property of allies.

"But I acknowledge it is not sufficient to say such a rule *would have been* applied. It is also necessary to show that there have been actual proceedings under it; and for that purpose two cases have been produced: the cases of *The Anne* and of *The Endeavour*."

[Proceeding then to examine the course taken by Portugal in these two cases, Sir William Scott gives as his opinion that "unless they could be overthrown they would sufficiently establish this fact: that it was the practice of the courts of Portugal, either under ancient ordinances, or under a silent, but prevailing usage, or under some recent edict, to confiscate the property of allies coming into the possession of Portuguese subjects from the hands of the enemy." He concludes his opinion in the following words:]

"Such are the observations which I think myself justified in making on the proceedings in these two cases; and after the general view which I have taken of the whole of this subject, it may be unnecessary to dwell more particularly on the minute parts of the several papers. It is, I think, clearly proved, that before the ordinance of May 1797, the courts of Portugal considered British property coming out of the hands of the enemy as subject to confisca-

tion; in two instances such property was actually confiscated, not by remote and inferior jurisdictions, but in their highest courts, in the capital of the empire, and under the direction of the state. The ordinance of 1797 cannot be applicable to preëxisting cases; I must determine all cases, as if they had come before me at the time of capture. The two former cases, therefore, of this class can receive no protection from this ordinance.

"Looking then to the conduct which Portugal had observed towards British property, and conceiving myself bound by the general law of this country, and more particularly by the authority of the case of the *San Iago*, to proceed on strict principles of reciprocity, I have no hesitation in pronouncing the first two cases subject to confiscation.

"I now come to the consideration of the subsequent cases. It has already been laid down, that the law of England restores on salvage, unless it is forced out of its natural course by the practice of its allies. In the preceding cases it has been reluctantly so diverted from its free course; but in May 1797, it appears Portugal renounced the harsher principles, and adopted a more liberal rule; upon what ground then can it be contended, that this country must, in regard to those cases which have occurred subsequent to this ordinance, follow the harsh and antiquated, in preference to the new and more lenient rule? It is said Portugal is not at liberty to make such an alteration in time of war, and that those who have once established a rule, must abide the consequences of it; but I confess I see no one reason on which this exercise of legislation can be denied to an independent state.

"It is said, Portugal will then legislate for this country; and so must every country in some degree legislate for us, whilst Great Britain professes to act upon the old principle, and adopt the law of its ally. In peace it is allowed such an alteration might be made, and why not in a time of war? There are no depending interests to be affected by it; it was an alteration as harmless to the world, as if it had been made in times of most profound peace. But it is said, the law is not even now established on equal terms of reciprocity towards this country. The salvage which Portugal has decreed is one-fifth, whilst the law of this country restores on payment of a sixth only. Perhaps a rule more closely concurring with

our own might have been more convenient; but the difference is not sufficient to justify this country in refusing Portuguese subjects the benefit of their alteration. In professing to act on the law of our ally, we must do it for better and for worse.

"I therefore restore the several vessels that have been taken since the ordinance of May 1797, on the salvage which Portugal has established, a salvage of one-eighth to ships of war, and one-fifth to privateers.

"In the condemned cases, I order the expenses of the claimants to be defrayed out of the proceeds."

(Extracted and condensed from Robinson: *Reports of Cases argued and determined in the High Court of Admiralty*, vol. 1, pp. 42-67.)

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#### CATTLE ON THE MEXICAN BORDER (1896)

THE Mexican Minister at Washington stated in a note of November 2, 1896, that the Mexican Treasury Department had given instructions to the Mexican custom houses at Nogales, Ciudad Juarez, and Las Palmas to permit the cattlemen of the United States to cross into Mexico to aid in collecting their herds under the same conditions that the custom houses of the United States exacted from Mexican cattlemen under similar circumstances, thus establishing a reciprocity of practice of both governments in the matter.

(Extract from Moore: *Digest of International Law*, vol. iv, p. 417.)

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#### § 48. COMITY

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#### THE CASE OF BINZEGGER (1884)

NOVEMBER 22, 1884, a Swiss newspaper published a statement that the authorities of the Canton of Zug had granted the petition for pardon of one Binzegger, who was sentenced in 1867 to life imprisonment for incendiarism, on condition of his promised emigration to America. The American Legation at Berne asked the

Federal Council to call the attention of the cantonal authorities to the laws of the United States which prohibited the landing of such persons. The action of the legation was approved by Mr. Frelinghuysen, with the statement that it was presumed that the Federal Council would prevent the consummation of the design to land a criminal in the United States, "as a violation of the comity, which should obtain between the two governments." The Federal Council, in reply to the legation, stated that Binzegger had been pardoned by the cantonal authorities on the ground of his good conduct during imprisonment; that he had been pardoned without any restrictive condition, and that he had manifested no intention of emigrating to the United States, but intended to go to Buenos Ayres.

(Taken textually from Moore: *Digest of International Law*, vol. IV, p. 147.)

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#### THE CASE OF JACOB FRANCK (1896)

In February, 1896, a discussion took place between the United States and Germany as to one Jacob Franck, a seaman on a German steamer, who had been discharged from that vessel or had deserted from it in December, 1895, at Savannah, Georgia, and had become a public charge by reason of insanity. The German Ambassador stated that no provision for his return was made by the imperial laws. It seems there was a question as to his citizenship. By the laws and regulations of the United States, provision is made for the relief of destitute or disabled American seamen in foreign lands by the consular representatives of the United States where such seamen are found to be citizens of the United States, even though they may have deserted.

The case was brought to the attention of the Secretary of the Treasury, who held that Franck was not an alien immigrant and could not be returned to Germany under the immigration laws, it being impossible to eliminate from the case his character as a deserting seaman. In this relation the attention of the German Ambassador was called to article 14 of the treaty between the United States and the German Empire of December 11, 1871, in relation to the delivery of deserters, and it was suggested that although the

article was permissive in form, it was framed on the assumption that each contracting party would recover its deserters and not permit them to become a charge upon a foreign community, and that the execution of it in such a case was "an international obligation of comity as well as a duty of humanity to the sufferer." The German Ambassador subsequently stated that the Imperial Government was unable to regard the article in question as imposing any obligation on German Consuls to take charge of seamen who were deserters. He also stated that three years previously the United States Legation at Berlin "expressly informed the Foreign Office that it declined, on principle, to send home at the expense of the United States destitute Americans who were in German insane asylums."

(Extract from Moore: *Digest of International Law*, vol. III, pp. 807-09.)

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#### § 49. EXTRADITION

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#### THE EXTRADITION OF NALBANDIAN (1910)

[THE following selection of the papers given in the *Foreign Relations of the United States* indicates the procedure in this interesting case:]

##### *Chargé Harvey to the Secretary of State*

[Telegram — Paraphrase]

AMERICAN LEGATION,  
*Bucharest, February 5, 1910.*

Mr. Harvey says that Vahan Nalbandian, who is wanted by the police of Lynn, Massachusetts, for murder, is held by the Bulgarian authorities, and that if extradition papers are sent at once the prisoner will be surrendered upon their presentation.

##### *Chargé Harvey to the Secretary of State*

[No. 52, Bulgarian series.]

AMERICAN LEGATION,  
*Bucharest, February 5, 1910.*

*Sir:* I have the honor to report on January 8 I received from Mr. Thomas M. Burckes, chief of police of Lynn, Massachusetts, a

communication stating that one Vahan Nalbandian had been indicted by the grand jury of Essex County in that state for the murder of one Minas K. Monigan, and that the said Nalbandian was supposed to be at Silistra, Bulgaria. He enclosed a circular police description, with pictures of the accused, and asked that the Bulgarian authorities be communicated with and the man apprehended and placed under arrest to await the receipt of extradition papers from his government.

I immediately went to the Bulgarian Legation in this city and communicated to them the request as above stated, and gave them the circular and picture of the accused. Yesterday I received a letter from the state's attorney (*procureur du tribunal*), of Silistra, Theodore Maneff, stating that Nalbandian has been arrested and had acknowledged that he was the person wanted by the Lynn police. After consultation with the Bulgarian Legation as to whether their government would permit the extradition of the accused, there being no treaty or convention of extradition between the two countries, I telegraphed the Bulgarian Foreign Office, stating that Nalbandian was wanted by the American police for a murder committed at Lynn, and that he had been arrested in Bulgaria and was now being held on my demand, and asked whether the Bulgarian Government would permit his extradition upon the presentation of the necessary papers, and whether they would hold the prisoner until such papers should arrive.

In response, I received a telegram last night from the Bulgarian Government stating that they had instructed their legation here how to act in the matter. This morning I received a message by telephone from the Bulgarian Legation that their government would surrender the accused on the presentation of proper extradition papers if the same were sent without delay. I immediately telegraphed the Department that the accused was wanted by the Lynn police and that the Bulgarian authorities would surrender him on presentation of the proper extradition papers.

I have, etc.,

ROLAND B. HARVEY.



[Enclosure — Translation]

*The Royal Bulgarian Legation to Chargé Harvey*

BUCHAREST, January 23, 1910.

In reply to the verbal requests made by M. le Chargé d'Affaires of the United States in regard to the search for and arrest of one Vahan Nalbandian, the Royal Legation of Bulgaria has the honor to inform the Legation of the United States of America that according to a communication from the Royal Ministry for Foreign Affairs the individual in question has just been arrested by the authorities of Silistra.

In bringing the foregoing to the knowledge of the honorable Legation of the United States the Royal Legation of Bulgaria has the honor to beg it to take the necessary steps at its earliest convenience and request the extradition of the said V. Nalbandian of the Royal Government, annexing the necessary papers.

*The Acting Secretary of State to Chargé Harvey*

[No. 30.]

DEPARTMENT OF STATE,  
Washington, February 19, 1910.

*Sir:* I enclose the extradition papers in the case of Vahan Nalbandian, *alias* Frank Jones, whose extradition from Bulgaria is desired by the State of Massachusetts. You will transmit the papers to the Foreign Office and request, as an act of grace, the surrender of Nalbandian upon the charge of murder. You will at the same time formally state in your note of request that owing to the limitations placed upon the power of the executive in this country it will not be possible for this government, in the absence of a treaty of extradition, to reciprocate this considerate action of the Bulgarian Government. You will also express the high appreciation of this government for the courtesy extended by the Bulgarian authorities in expressing their willingness to surrender this man.

I am, etc.,

HUNTINGTON WILSON.

*Chargé Harvey to the Secretary of State*

[No. 9, Bulgarian series.]

AMERICAN LEGATION,  
Bucharest, April 7, 1910.

*Sir:* Referring to the case of Vahan Nalbandian, whose extradition from Bulgaria was asked for by the police authorities of Lynn, Massachusetts, on the charge of murder committed in that city, I have the honor to inform the Department that after the receipt of the Department's instruction, Bulgarian series No. 30, of February 19, and upon the arrival of Stacey R. Burckes, the special agent of the President, named in the warrant accompanying the extradition papers enclosed in the said instruction No. 30 (Mar. 13), I prepared, with the aid and advice of Mr. Carter, a note to General Paprikoff, the Minister for Foreign Affairs of Bulgaria, a copy of which I herewith enclose, formally asking for the extradition of the said Nalbandian as an act of grace on the part of the Bulgarian Government, and again informing them, as I had previously done in the case of the Bulgarian Legation in this city, that, owing to the limitations placed by the Constitution of the United States upon the executive, my government would not be able to reciprocate under like circumstances.

As neither Mr. Burckes nor Mr. Wells, who accompanied him, could speak any language except English and were entirely unfamiliar with the necessary formalities in these countries, and as I was about to proceed to Sofia anyhow, Mr. Carter and myself considered it necessary for me to proceed to Sofia with the agents above referred to. We arrived at Sofia in the evening of March 15, and I obtained an audience and presented my note to General Paprikoff in person, on the morning of March 17. I went over the matter fully with him and with Mr. Radeff, the chief of the political section, who had the matter in charge, and reiterated the impossibility of my government to reciprocate. General Paprikoff at once stated that he thought there would be no difficulty about the matter, but that, as it would have to be referred to the Minister of Justice, and that as some if not all the papers would have to be translated into Bulgarian, he would not be able to give me definite word before Saturday, March 19. On that day I received an informal communication that the extradition would be granted and

that the formal papers would be delivered to me on Monday. I immediately communicated to Mr. Carter the information received, and steps were at once taken at Bucharest to arrange for his transit across Roumania and Hungary to Fiume, as that route seemed to be the least troublesome and most expeditious, there being a Cunard Line steamer, the *Ullonia*, sailing from that port on April 2. On Monday I received a formal notice from the Bulgarian Government that the extradition would be granted. The Bulgarian Government also informed me that it would assume all the expenses incident to the retention of the prisoner while in Bulgaria, as well as his transportation to whatever port or city on their frontier that we might designate for his delivery to our agents. It also refused to allow me to pay for the translation of the papers, or, in fact, to bear any part of the expenses incurred in the whole matter while in Bulgaria. The whole attitude of the Bulgarian authorities was most courteous and obliging, and I took pains to assure them of the great appreciation of my government and the legation.

I have, etc.,

ROLAND B. HARVEY.

*Minister Carter to the Secretary of State*

[Extract]

[No. 63, Roumanian series.]

AMERICAN LEGATION,  
Bucharest, April 9, 1910.

*Sir:* With reference to the Department's No. 30, Bulgarian series, of February 19 (File No. 21641/7), relating to the extradition of Vahan Nalbandian, the statement of the case in Mr. Harvey's No. 9, Bulgarian series, of the 7th instant, is so full that I have little to add for the information of the Department.

During Mr. Harvey's absence at Sofia I arranged with the Austrian Legation here for the safe-conduct of the United States agents with their prisoner across Austrian territory to Fiume, and with the Foreign Office at Bucharest for their transit by way of Roumania.

At the last moment, however, the Minister for Foreign Affairs informed me that permission for the transit of the prisoner could not be granted. This refusal was based upon the grounds that having no extradition treaty with us, Roumanian law demanded

the same process for the transit as if it were a question of a case of extradition, and, besides, that the prisoner being extradited on the charge of murder, for which the penalty in the United States is death, the transit could not have been effected in any case unless our government promised not to exact the death penalty.

That the law of the country did not permit it I could not question, but I did express my regret that I should not have been so informed either on the day I made the request or at least in sufficient time during the ten days thereafter to enable me to change the arrangement.

However, by the great courtesy and prompt action of the officials of the Bulgarian, Servian, and Austrian Governments, the arrangements were speedily altered so that the agents with their prisoner were thereby enabled to reach Fiume the very morning of the day their ship sailed.

I may mention that at the request of the agents I sent Mr. Bancroft, the clerk of this legation, with them to help them on their way. His presence of mind at the Austrian frontier, owing to our late change of plans (the instructions to the police had not arrived), made it possible for the agents to proceed by the one train which got them to their destination in time.

I have, etc.,

JOHN RIDGELY CARTER.

(*Foreign Relations of the United States, 1910, pp. 122-28.*)

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## THE CHARLTON EXTRADITION CASE

*The Supreme Court of the United States, 1913*

THIS was an appeal to the Supreme Court of the United States from the judgment of the Circuit Court of the United States for the District of New Jersey dismissing a petition for a writ of *habeas corpus* on behalf of one Porter Charlton, held under warrant for extradition to Italy as a fugitive from justice.

The petitioner was an American citizen who, on his own confession, had murdered his wife at Moltrasio, Italy, and had escaped to New Jersey. On complaint duly made by the Italian Vice-Consul, extradition proceedings were instituted in accordance

with the treaty between the United States and Italy, article 1 of which is as follows:

"The Government of the United States and the Government of Italy mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other; Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed." (Malloy: *Treaties*, vol. 1, p. 967.)

A warrant having duly issued for Charlton's arrest, the magistrate found, from the evidence submitted, probable cause for the charge of murder, and committed Charlton to await a warrant from the Secretary of State authorizing his extradition to Italy. The execution of the warrant was stayed by *habeas corpus* proceedings and the appeal taken to the Supreme Court.

Three main objections were urged against the extradition of Charlton:

- (1) That evidence of the insanity of the accused had been offered and excluded.
- (2) That under the treaty with Italy neither party is bound to deliver up its own citizens: i.e., the term "persons" does not include citizens of the asylum country.
- (3) That inasmuch as Italy forbids extradition of her own citizens, the treaty lacks mutuality and, as regards a case like that of Charlton, has been abrogated.

1. It was contended for the appellant that by excluding evidence as to his insanity, the magistrate had failed to give effect to the provision of the Act of 1882 (22 *Statutes*, 215, Dec. 3) requiring that the defendant's witnesses shall be heard. But the court held that the proceeding before the magistrate is not a trial; "the issue is confined to the single question of whether the evidence for the state makes a *prima facie* case of guilt sufficient to make it proper to hold the party for trial." Hence, in the opinion of the

court, the examining magistrate did not act in excess of his authority. "If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defending the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws."

2. The second objection turned upon the interpretation of the word "persons" in the treaty with Italy. Does it include citizens of the asylum country? Counsel for the appellant maintained that it does not, that there is an implied exclusion and that this interpretation is supported by the practice of Italy, which refuses to extradite its own citizens on the ground that the penal jurisdiction of Italy takes cognizance of crimes committed by Italians in a foreign country. Further, many extradition treaties, even some made by the United States, expressly exclude citizens from their scope. The court held, however, that such an exception must be explicit; "the word 'persons' includes *all* persons when not qualified as it is in some of the treaties between this and other nations." And the court went on to point out the effect of such an interpretation upon extradition treaties such as that with Great Britain in 1843. "Inasmuch as under the laws of that country, as of this, crimes committed by their citizens within the jurisdiction of another country were punishable only where the crime was committed, it was important that the Italian interpretation should not be accepted."

3. The objection that the treaty was void was more fundamental; Italy had refused to extradite Italian citizens to the United States, and, even in the present proceedings, had gone on record as still adhering to that principle; hence, the appellant contended, the obligations under the treaty were not reciprocal and the treaty, *pro tanto*, was void. The court recognized that absence of mutuality rendered the treaty *voidable*, but until the United States expressly abrogated the treaty, it was still in force. The alternative to abrogation of this particular treaty was to give up

its interpretation of "persons" as including citizens, and this would affect adversely five other treaties. "If the attitude of Italy was, as contended, a violation of the obligations of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect." In the language of Vattel, quoted by the court, "when the treaty of peace is violated by one of the contracting parties, the other has the option of either declaring the treaty null and void, or allowing it still to subsist; . . . if he chooses not to come to a rupture, the treaty remains valid and obligatory." There was, further, the controlling fact that the executive department had recognized the treaty obligation as still binding. In his decision to extradite Charlton, the Secretary of State had stated that "it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy, even though Italy should not, by reason of the provision of her municipal law, be able to surrender its citizens to us."<sup>1</sup> This was considered decisive by the court and judgment was affirmed.

(*Charlton v. Kelly*, 229 U.S. 447-76; *American Journal of International Law* [1913], vol. VII, pp. 580-82; 637-53.)

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### THE CASE OF MYERS AND TUNSTALL (1862)

In February, 1862, Henry Myers and J. F. Tunstall, American citizens, members of the crew of the Confederate vessel *Sumter*, then lying at Gibraltar, took passage on the French merchant steamer *Ville de Malaga* for Cadiz, in order to obtain a supply of coal for the Confederate cruiser. The *Ville de Malaga*, having called at Tangier, Morocco, Myers and Tunstall went ashore, where, as they were walking in the street, the United States Consul, with the aid of a Moorish military guard, seized them and conveyed them to the consulate, where they were kept in irons till the arrival of the U.S.S. *Ino*, on which they were shipped for the United States. They were subsequently committed to military

<sup>1</sup> The French Government has, in its practice of extradition, made it a fixed and apparently unalterable rule not to extradite its own nationals. See § 41, p. 373.

custody at Fort Warren, Boston. The point having been raised that, because the men were political offenders, Morocco should have been asked to deliver them up, Mr. Seward replied that none of the treaties of the Christian nations with Morocco excepted that class of offenders from its operation. He intimated that extradition treaties between Christian nations contained such an exception, because those nations trusted one another to prevent any abuse of their protection by refugees. No Christian state had shown itself willing thus to trust the Empire of Morocco. The utmost, he said, that could be pretended was "that some Christian nations, including the United States, have informally manifested their approval of the extension of the right of asylum granted by the Sultan of Turkey to the Hungarian refugees in the late civil war in Austria. But they were no longer combatants; their attempted revolution was ended, and the refugees were demanded by Austria, not on the ground of apprehensions of danger from the continued hostility, but to punish them for the treason which she alleged they had committed. Assuming the facts as reported, the offenders in this case were not held or sheltered in Tangier as exiles, or as refugees in asylum, but they were taken in the very act of war against this government." Mr. Seward added that the whole proceeding was conducted with the acquiescence and aid of the Moorish governor.

(Taken textually from Moore: *Digest of International Law*, vol. IV, pp. 332-33.)

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### ANARCHISTS (1894)

ALTHOUGH anarchists profess political motives for their acts, yet in June, 1894, the British Government, after full consideration of the question by the Court of Queen's Bench, delivered up to France a fugitive from justice, who was charged with causing the explosion at the Café Véry in Paris, as well as another explosion at certain government barracks. The court held "that, in order to constitute an offense of a political character, there must be two or more parties in the state, each seeking to impose the government of their own choice on the other;" and that the offense must



be "committed by one side or the other in pursuance of that object."

(Taken textually from Moore: *Digest of International Law*, vol. IV, p. 354.)

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UNITED STATES v. RAUSCHER

*The Supreme Court of the United States, 1886*

IN 1886 the defendant Rauscher was indicted in the Circuit Court of the United States for the Southern District of New York on the charge of inflicting cruel and unusual punishment upon Janssen, a member of the crew of an American vessel of which Rauscher was an officer. Previous to the indictment, Rauscher had been extradited from Great Britain charged with the murder of Janssen, the same set of facts having been submitted as proof in the extradition proceedings as had later formed the basis of the indictment for the minor offense. Rauscher, however, had not been tried for murder, the charge in the indictment having been substituted, although the latter offense was not extraditable under the treaty involved — the Webster-Ashburton Treaty of 1842. The prisoner having been found guilty, it was contended, on motion in arrest of judgment, that there was no jurisdiction to try Rauscher on a charge other than that for which he had been extradited, and upon a division of opinion among the judges of the Circuit Court, the question was certified to the Supreme Court of the United States for its judgment.

Having pointed out that there is no obligation to extradite, apart from treaty, and that, in the United States, extradition is a matter falling solely within the powers of the Federal Government, the court considered the treaty of 1842 in so far as it provided "for the giving up of criminals, fugitives from justice, in certain cases," seven in all. It was recalled that the very question before the court had formed the subject of diplomatic negotiations between the United States and Great Britain in previous cases of extradition. ". . . Mr. Fish defended the right of the government or state in which the offense was committed to try a person extradited under this treaty for any other criminal offense, as well as for the one for which the extradition had been demanded; while Lord Derby, at the head of the Foreign Office in England, construed the treaty as

requiring the government which had demanded the extradition of an offender against its laws for a prescribed offense, mentioned in the treaty and in the demand for his extradition, to try him for that offense and for no other. . . . The negotiations between the two governments, however, on that subject were inconclusive. . . .”

The court expressed its own opinion, in part, as follows:

“We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offense than that for which he had been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition, because it can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offense of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party. In exercising its discretion, it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty, and person, while it would not be willing to do this on account of minor misdemeanors or of a certain class of political offenses in which it would have no interest or sympathy. . . . Indeed, the enumeration of offenses in most of these treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others. . . .

“It is unreasonable to suppose that any demand for rendition framed upon a general representation to the government of the asylum, (if we may use such an expression), that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any

particular offense with which he was charged, and even without specifying an offense mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offense than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offense in making the demand. . . . If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offense is charged to have been committed, there is very little use for this particularity in charging a specific offense, requiring that offense to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it. . . .

"If there should remain any doubt upon this construction of the treaty itself, the language of two acts of Congress, heretofore cited, incorporated in the Revised Statutes, must set this question at rest. [*Rev. Stat.*, §§ 5272, 5275.] . . .

"The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. . . .

"Upon a review of these decisions of the federal and state courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition, that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given

him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."<sup>1</sup>

(*United States v. Rauscher*, 119 U.S. 407-36; *Foreign Relations of the United States*, 1876, pp. 204-307; Moore: *Extradition*, vol. 1, pp. 212-46.)

## THE SAVARKAR CASE

*The Permanent Court of Arbitration at The Hague, 1911*

By an exchange of notes on the 4th and the 5th of October, 1910, the British and the French Governments agreed to submit to arbitration, "on the one hand, the questions of fact and law raised by the arrest and restoration to the mail steamer *Morea* at Marseilles, on the 8th of July, 1910, of the Indian, Vinayak Damodar Savarkar, who had escaped from that vessel, on board of which he was in custody; and on the other hand, the demand of the Government of the Republic with a view to the restitution to them of Savarkar."

The circumstances leading up to the demand of the French Government for the restitution of Savarkar were as follows:

Savarkar was a Hindu revolutionary accused of abetting the

<sup>1</sup> By its decision in *Rauscher's case* the Supreme Court enunciated for the United States the principle contended for by Great Britain ten years previously in its controversy with the United States arising out of the *Lawrence* and the *Winslow* cases. So apparently irreconcilable were the respective contentions, that when Great Britain in *Winslow's case* asked for an assurance that he would not be tried for any offense other than the one for which extradition was requested "until he had been restored or had an opportunity of returning to Her Majesty's dominions," Mr. Fish replied that "neither the President, nor any officer of the Federal Government, has power to control or to dismiss the prosecution in *Winslow's case*, or in any case where the offense is against the laws of one of the states, and could not give any stipulation or make any arrangement whatever as to the offenses for which he should be tried when returned to the justice of the state against whose laws he may have offended." As a result, extradition proceedings under the Treaty of 1842 were suspended for six months, neither government making requisitions and many criminals in consequence escaping, among them *Winslow*. But as such a situation was found inconvenient, the British Government undertook to apply the provisions of the old treaty until a new extradition arrangement could be made "without asking for any engagement as to such persons not being tried in the United States for other than the offenses for which extradition has been demanded."

The new extradition treaty with Great Britain was concluded in 1889 and contains a provision in the sense of the British contention and the *Rauscher* decision.

murder of an Indian official. He was arrested in London and, after a preliminary examination, ordered to be sent back to India to stand trial. As the steamer *Morea*, on which he was to sail, would in the ordinary course of her voyage touch at Marseilles, and as there might possibly be an attempt on the part of Hindu sympathizers at that port to rescue Savarkar, Sir E. Henry, the Commissioner of the Metropolitan Police in London, wrote on June 29 to M. Hennion, *Directeur de la Sûreté Général* at Paris, asking him to insure the safety of the prisoner while at Marseilles. Though M. Hennion did not send a reply until the 9th of July, the Ministry of the Interior gave the necessary instructions through the Prefect of the Rhône, to whom was communicated the letter of Sir E. Henry. On the 7th of July the *Morea* arrived at Marseilles, and, soon after her arrival, M. Leblais, *Commissaire Spécial*, came on board and showed a letter relative to assistance to be given by the French police in case of need, and, before leaving, introduced the British officials in charge of Savarkar to the French officer of *gendarmerie*.

Next morning Savarkar escaped through a porthole and swam ashore. The Indian constables on the *Morea* raised a shout and the French policeman on guard, *Brigadier* Pesquié, went in pursuit. Overtaking him, he started back to the ship with him, and, on the way, three men from the *Morea* came up and seized Savarkar by the shoulder, though Pesquié still kept custody of his prisoner and handed him over to the British officials on board.

The *Morea* left Marseilles on July 9 and arrived at Aden on July 17. But it was not till July 18 that France made representation to Great Britain that the surrender of Savarkar had been irregular and in violation of international law, and requested the restoration of Savarkar to French jurisdiction. In the course of negotiations, the matter was seen to present an interesting and important subject for international adjudication. Accordingly, following the exchange of notes referred to, a protocol was signed at London on October 25, 1910, referring the matter to a tribunal of five arbitrators to be chosen from the Permanent Court at The Hague. The procedure to be followed was laid down in the protocol, but in a supplementary note a few days later it was agreed that, in the absence of specific provisions on any point, the Con-

vention of 1907 for the Pacific Settlement of International Disputes was to govern.

The tribunal met at The Hague on February 14, 1911, under the presidency of M. Beernaert, of Belgium. The other members were the Earl of Desart, of Great Britain, M. Renault, of France, M. Gram, of Norway, and Jonkeer A. F. de Savornin Lohman, of the Netherlands. The decision was rendered February 24, 1911.

As the case was presented, it was not so much the facts that were in controversy as the juridical interpretation of the facts and the principles to be applied. France advanced four arguments to support her demand:

1. Savarkar, on French territory, had an inalienable right of asylum.
2. British officials had violated French sovereignty.
3. The surrender by a subordinate official was irregular in French law and in international law, and for this reason Savarkar ought to have been given back to the French authorities.
4. There had been error on the part of Pesquié as to the identity of the person surrendered.

1. France did not press this point before the tribunal, though it had put it forward in the diplomatic correspondence with the British Foreign Secretary. As the British case put it, "the power of expulsion is the complement of the power of exclusion," and though a government may grant asylum, the fugitive may not claim it as of right. Great Britain has used the power of expulsion so rarely that a mistaken idea has arisen about the right of asylum in that country. There may be some question as to where the power to expel resides, but Great Britain adheres to the universal principle of the right of expulsion.

2. The violation of French sovereignty, it was argued, arose from the detention of Savarkar in a French port as well as from his arrest on French soil. France had not guaranteed transit in the arrangement made with Sir E. Henry. Such an agreement would have to be explicit and was not in the power of M. Hennion to make. Nor had Pesquié orders to arrest Savarkar, as such, on French territory. His instructions were merely to keep off Hindus

and to prevent the crew from going ashore. Savarkar, the revolutionary, once upon French soil did not come under the ordinary precautionary measures taken by the French police at Marseilles in accordance with the Anglo-French Declaration *re* deserters, and could not be delivered up except by the sovereign act of extradition. In the events leading to the arrest, the British officials had taken the initiative by raising an outcry which caused Pesquié to pursue and had assisted in the arrest, thus usurping authority within French jurisdiction.

On the contrary, Great Britain maintained that the detention of Savarkar on the *Morea* was not illegal under the law of the flag, and hence French sovereignty over territorial waters had not been violated. Merely touching at a port in the prosecution of a voyage does not, for purposes of jurisdiction, have the same significance as transit over French soil. The *Morea*, especially after the Henry-Hennion correspondence, entered the port under an implied permission, and, further, the action of the French police authorities, in allowing Savarkar to remain on board, showed a clear intention not to exercise any jurisdiction over Savarkar. Were it otherwise, the *Morea* would not have come within French waters; at any rate, other arrangements would have been made for Savarkar's transportation. As for the violation of sovereignty upon French soil, Great Britain contended that the French Government had issued instructions recognizing the legality of the custody of Savarkar on the *Morea* and directing steps to be taken to prevent escape. The inference that the British Government made was that France would deny to Savarkar any right to avail himself of an opportunity to find asylum on French soil. The police arrangements had been made in accordance with these instructions. The order preventing the crew from going ashore was the complement of that preventing any Hindus from going on board and not a mere precaution against desertion. The English officials did not effect the arrest — that was done by Pesquié; they merely gave the assistance that any bystander might have been called upon to render, and gave it in all good faith and in reliance upon arrangements already made. If, suggested the British reply, a Hindu sympathizer had succeeded in getting Savarkar ashore, would the same set of circumstances be regarded as anything else

than proper? And if the latter situation would have been covered by the arrangements at Marseilles, why not the actual case that arose, especially as the telegraphic instructions of the Minister of the Interior were "to prevent all attempts of this kind"?

3. Irregularity of surrender was the chief objection taken by France. Once Savarkar was on French soil, his status became a matter for the Anglo-French extradition treaty to determine. In extradition proceedings only competent agents of the state competent to punish can make the demand and only competent agents of the state of refuge can surrender. Extradition is in its nature an international contract, a diplomatic bargain, and the consent of the state of refuge must be expressed in the manner indicated in the treaty. In the case of Savarkar this should have been through the diplomatic channel; in no case could the action of agents not qualified have the effect of removing him from French jurisdiction.

Great Britain admitted that the return had been made without conforming to the formalities of the extradition treaties. As Savarkar had been handed over without any diplomatic demand, there was no occasion to make one afterwards. The proceedings had been outside of extradition procedure, but were none the less regular because exceptional. States had various methods of ridding themselves of aliens. They could exclude or expel; expulsion might be made of their own accord or on request; and a request might be presented through the diplomatic channel or directly. Extradition implied surrender after formal demand, usually, but not necessarily, in pursuance of an extradition treaty. A state may surrender for an offense outside the treaty and in a manner other than stipulated in the treaty. The Anglo-French treaty did not preclude other arrangements and the British Government had been entitled to rely on the correspondence of the administrative officials as a guarantee that the French Government acquiesced in the return of Savarkar, especially as no immediate protest was made. Even granting that Pesquié had acted irregularly, that fact could not remove Savarkar from the forum where he stood charged with crime. The mistake of a municipal official is not a matter of international concern. France had taken this ground very strongly in the Lamirande case in 1866, where, by an irregularity on the part of a Canadian official, France had obtained Lamirande and had



refused to give him up, although, to the knowledge of the French Consul, *habeas corpus* proceedings were still pending in the Canadian courts. In a word, the British contention was, that, as the British authorities had used neither fraud nor violence, Savarkar was rightly before the Indian courts and could not be removed therefrom because a French police officer had acted in excess of his authority.

4. The ignorance of Pesquié as to the identity of the man arrested was held by France to constitute essential error and to make the whole proceeding a nullity. Pesquié affirmed that he thought Savarkar was merely one of the crew that had deserted or "possibly had committed an offense on board." The order given him to prevent the crew from coming off was the reason for the pursuit, not any zeal to execute extraterritorial commissions for Great Britain.

Great Britain, however, pointed out in reply that the British officials could not be taxed with the misapprehension under which Pesquié had acted. He had asked no questions about his prisoner, although he had conversed in French with the British inspector in charge of Savarkar. He had received no false information and the British constables could not be expected to know that he was ignorant of Savarkar's identity. At any rate, his superior officials were well aware of it, for Pesquié did not put forward this plea until July 23, several days after France had taken up the matter diplomatically, yet no one asserted the man to be other than Savarkar. But whether there had been error or not, Great Britain contended, the right to retain Savarkar was in no way affected.

The tribunal, in rendering its award, attached full value to the arrangements made through the Henry-Hennion correspondence and considered that "the circumstances show that the persons on board in charge of Savarkar might well have believed that they could count on the assistance of the French police." The ignorance of the *brigadier* as to the identity of Savarkar, as well as the assistance given by the British officials, was without significance; there had been no recourse to fraud or force, and "there was not, in the circumstances of the arrest and delivery of Savarkar to the British authorities and of his removal to India, anything in the nature of a violation of the sovereignty of France, and . . . all

those who took part in the matter certainly acted in good faith and had no thought of doing anything unlawful."

On the important point of irregularity, the tribunal sustained the contention of the French, but affirmed that "there is no rule of international law imposing, in circumstances such as those which have been set out above, any obligation on the power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that power."

Hence the award: "The arbitral tribunal decides that the Government of His Britannic Majesty is not required to restore the said Vinayak Damodar Savarkar to the Government of the French Republic."

(*British Case and Counter-case*, published as White Papers; *Revue Générale de Droit International Public* [1911], vol. xviii, pp. 303-52; *American Journal of International Law* [1911], vol. v, pp. 208-10; 520-23; Supplement, pp. 37-38; *Revue de Droit International* [1911], vol. xlviii, pp. 370-403; G. G. Wilson: *The Hague Arbitration Cases*.)

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### § 50. LETTERS ROGATORY

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#### LETTERS ROGATORY (1874)

IN 1874 a suit was pending in the District Court of the United States for the Southern District of New York against a German firm having a branch in New York City, to recover penalties for alleged undervaluation in the importation of goods. As both parties desired to obtain the testimony of persons at various places in Europe, the court, on motion of the attorney, made, in conformity with the practice long prevailing in the district, an order designating the United States Consuls at the specified places as commissioners to take the desired testimony. The order authorized, but did not require, the consuls so to act, and in performing such functions it was understood that they acted as commissioners and not as consuls, their compensation being paid by the litigants, and that they had no power to compel the attendance of witnesses, except with the coöperation of the local authorities, which was sometimes granted and sometimes withheld.

Among the consuls designated to act in the present instance, four were in Germany. The German Government objected to their executing the commissions, on the ground that the taking of the sworn testimony of German subjects in the cities of the Empire was not one of the functions of consuls, and could not be derived from article 9 of the consular convention between the two countries.

The United States replied that it was not claimed that a United States Consul, as such, had, by treaty or convention, the right to take such testimony; that the consul's services in such matters were purely ministerial and entirely voluntary; that the government was not a party to the proceeding, except so far as it might have, as in the present instance, an interest in the action; and that it was hoped that the German Government would, with these explanations, withdraw its objections and consider it an act of comity to facilitate the taking of the testimony.

The German Government answered that, while the competency of the courts in the United States to appoint commissioners to take testimony was not doubted, yet, if the testimony was to be taken in a foreign country, it could, according to international law, be taken, in the absence of a treaty on the subject, only under the limitations and forms prescribed by the laws there in force; that the objection of the German Government "was not so much to the taking of testimony under oath by American Consuls in their official capacity" as to "the taking of testimony by American Commissioners within the limits of the German Empire, . . . it being incompatible with the legal system of this country;" that the German courts, however, recognized the duty, under the sanction of German law, of assisting the courts of other countries to do justice, and therefore made it a practice to comply, without treaty obligation, with the requests of foreign courts to obtain testimony, such demands being known in Germany as "requisitions," which were analogous to "letters rogatory" in England and the United States; and that in such proceedings the parties to the litigation were at liberty through their attorneys to exercise a proper influence by putting questions through the judges.

(Extract from Moore: *Digest of International Law*, vol. II, pp. 124-26.)

## CHAPTER X

### ACTION TAKEN TO ENFORCE INTERNATIONAL LAW AND PROTECT THE GENERAL INTERESTS OF INTERNATIONAL SOCIETY

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#### § 51. PIRACY

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#### SIR LEOLINE JENKINS RELATES THE TRIAL OF PRIVATEERS FOR PIRACY (1675)

“BUT I see your embarrass hath been much greater about our Scotch privateers: The truth is, I am much scandalized at them in a time of war; they are in my poor judgment great instruments to irritate the king’s friends, to undo his subjects, and none at all to profit upon the enemy; but it will not be remedied: the privateers in our wars are like the *mathematici* in old Rome, a sort of people that will be always found fault with, but still made use of: I may venture to say the same upon your question, which is the proper place of judging these Scots, that it will often fall out, but it will never be decided; because there is no third power that can give a law that shall be decisive or binding between two independent princes, unless themselves shall please to do it (which seldom happens) and then cannot be extended beyond the cases expressed by that treaty. His Majesty had, when I came from home, a controversy with France, in a case not much unlike yours: a French merchantman had gone out from La Rochelle to the West Indies, and had committed many robberies and great cruelties upon those of his crew in the voyage; he, in his return, put in at Kinsale for refreshment, his company accuse him, he flies, his ship and goods are confiscated, as the goods of pirates: This sentence was opposed by the French Ambassador M. Colbert, and the cause desired to be remanded to the natural judge

(as was pretended) in France. This produced several memorials, and several answers, in which my little service was commanded; and the King and his council were pleased to adjudge, he was sufficiently founded in point of jurisdiction, to confiscate that ship and goods, and to try capitally the person himself, had he been in hold; the matter of renvoy being a thing quite disused among princes; and as every man, by the usage of our European nations, is justiciable in the place where the crime is committed; so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they are taken.”<sup>1</sup>

(Extract from Wynne: *Life of Sir Leoline Jenkins* [London, 1724], vol. II, p. 714.)

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## § 52. PROTECTION OF SOVEREIGN INTERESTS

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### THE EMPEROR OF AUSTRIA v. DAY AND KOSSUTH (1861)

THE defendants having manufactured a large quantity of printed paper to represent the public paper money of the Kingdom of Hungary, in order to use it, when opportunity should occur, for purposes hostile to the sovereign ruling power of that kingdom, they were restrained, at the suit of the Emperor of Austria, as King of Hungary, and decreed to deliver up the paper to be canceled, and restrained by perpetual injunction from manufacturing such paper.

[The arguments of counsel were omitted.]

*The Vice-Chancellor* (Sir John Stuart). The plaintiff sues in his sovereign character, as King of Hungary. He asks the assistance of the court to prevent an injury, of a public kind, to what he asserts to be his legal rights. These rights he claims as the ac-

<sup>1</sup> Sir Leoline Jenkins in a charge given at a session of Admiralty within the Cinque Ports September 2, 1668, said: “You are therefore to enquire of all pirates and sea-rovers, they are in the eye of the law *hostes humani generis*, enemies not of one nation or of one sort of people only, but of all mankind. They are outlawed, as I may say, by the laws of all nations; that is, out of the protection of all princes and of all laws whatsoever. Everybody is commissioned, and is to be armed against them, as against rebels and traitors, to subdue and to root them out.” (Extract from Wynne: *Life of Sir Leoline Jenkins* [London, 1724], vol. I, p. lxxvi.)

knowledgeable possessor of the sovereign in a foreign state at peace with this kingdom.

It appears that the defendants have manufactured and prepared in this country a vast quantity of printed paper, purported to represent public paper money of Hungary, such as could be lawfully issued by the sovereign power. What they have thus prepared is intended to be circulated at some future time as the public paper money of Hungary. This paper has been thus made and prepared, not only without the license of the plaintiff, but as in exercise of some contemplated power hostile to that of the plaintiff, and intended to supersede it.

What the court has now to decide is the question whether the defendants can, by the law of England, be allowed to continue in possession, or to be protected in the possession, of this large quantity of printed paper, manufactured and held by them for such a purpose; or whether, on the other hand, the plaintiff is entitled to have the right of which he claims to be in possession protected against the invasion of the defendants, and to have delivered up to him what has been thus prepared, and made ready to be used, for a purpose hostile to his existing right.

For the defendants, it has been argued that this court has no jurisdiction in such a case; that what is complained of is a public wrong, not cognizable by the law of England, because it relates merely to the public and political affairs of a foreign nation. The defendant's counsel have admitted that a foreign sovereign may have relief in this court when he sues in his public character to recover public property within the jurisdiction of this court. But they insist that what is in question in this cause is not any right of property, but a mere public and political right which, by the Constitution of Hungary, is not absolute in the sovereign, but subject to the control and direction of the Diet of that kingdom. Such a right, they say, is beyond the jurisdiction of this court.

If the question related merely to an affair of state it would be a question, not of law, but for mere political discussion. But the regulation of the coin and currency of every state is a great prerogative right of the sovereign power. It is not a mere municipal right, or a mere question of municipal law. Money is the medium of commerce between all civilized nations; therefore, the prerog-

ative of each sovereign state as to money is but a great public right recognized and protected by the law of nations. A public right, recognized by the law of nations, is a legal right; because the law of nations is part of the common law of England.

These propositions are supported by unquestionable authority. In the modern version of Blackstone's *Commentaries* (4 *Steph. Com.* 282) it is laid down (and it has so always been held in our courts) that the law of nations, wherever any question arises, which is properly the object of its jurisdiction, is adopted in its full extent by the common law of England, and held to be part of the law of the land. Acts of Parliament, which have been from time to time made to enforce this universal law, or to facilitate the execution of its decisions, are not considered as introductive of any new rule, but merely declaratory of the old fundamental constitution of the kingdom, without which it must cease to be part of the civilized world.

To apply these acknowledged principles of the law of nations and law of England to the present case, it appears that the British Parliament (by the Act 11 Geo. 4 and 1 Wm. 4, c. 66) has enacted that the forgery or counterfeiting the paper money of any foreign sovereign or state is a felony punishable by the law of England. This statute is a legislative recognition of the general right of the sovereign authority in foreign states to the assistance of the laws of this country to protect their rights as to the regulation of their paper money as well as their coin, and to punish, by the law of England, offenses against that power.

The friendly relations between civilized countries require, for their safety, the protection by municipal law of an existing sovereign right of this kind recognized by the law of nations. It appears from the evidence of the defendant, Kossuth, himself that the present plaintiff is in possession of the supreme power in Hungary, and that the property now in question, which this defendant has caused to be manufactured in order, at some future time, to issue it as the public paper money of the State of Hungary, is not intended to be immediately used for that purpose, because of the existing power of the plaintiff. But it also appears that the paper so manufactured is now in the possession and power of both the defendants, ready to be used, when the defendant,

Kossuth, shall think fit, for a purpose adverse to the existing right of the plaintiff.

The manufactured paper in question, therefore, is property which has been made for no other purpose, and can be used for no other purpose, except one hostile to the sovereign rights of the plaintiff. It is not property of a kind which, like warlike weapons or other property, may be lawfully used for other purposes. And if the avowed and single purpose, for which this property is now in the hands of the defendants, be a purpose hostile to the plaintiff's rights, if this court were to refuse its interference, the refusal would amount to a decision that it has no jurisdiction to protect the legal right of the plaintiff — a legal right recognized by the law of nations, and, therefore, by the law of England.

But it has been said that the right of the plaintiff is not an absolute right, but is subject to the control of the Diet of Hungary. The prerogative rights of the Crown of England are all directly or indirectly subject to control of Parliament, and the sovereign rights in most other nations are subject to some control or limitation, yet they are not therefore the less actual rights; and it is at the suit of the sovereign that they are to be protected by the law.

Then it is said that the defendant, Kossuth, contemplates the overthrow of the existing right of the plaintiff, and that when it is overthrown, and the power transferred to himself or to some other body, which shall sanction the use of this paper as the current money of the Kingdom of Hungary, he will then be entitled to use it; and therefore that this court ought not now to interfere.

To this argument the answer is that this court, like other public tribunals, can deal only with existing laws and existing governments. Obedience to existing laws and to existing governments, by which alone the laws can be enforced, are purposes essential to the distribution of justice, and to the maintenance of civil society. Therefore, if by the existing laws the plaintiff has the right which he asserts, and if the defendants have made and have now in their possession the property in question, which has been made and now is in their hands for no other purpose than one hostile to the legal rights of the plaintiff, the legal right of the plaintiff ought to be protected by the interference of this court. This right of the plaintiff is clear on principle, unless the court is to aban-



don its protective jurisdiction. It is clear also upon authority. In the case of *Farina v. Silverlock* (1 K. & J. 509), an injunction was granted against a printer, who had made and printed papers which he had in his possession, merely because they might be used, and were ready to be used, in such a manner as to violate the legal right of the plaintiff, although they were not in fact actually used for that purpose.

Foreign states at peace with this country have always been held entitled to the assistance of the law of England to vindicate and protect their rights, and to punish offenders against those acknowledged public privileges recognized by the law of nations. Even the sovereign power, under a revolutionary government recognized for the time by the Crown of England as an existing government, has had its rights protected, and offenders against those rights punished by prosecution in the courts of England. The prosecution and conviction of M. Peltier, for a libel on the First Consul of France, proceeded on this principle. In earlier times Lord George Gordon was tried and convicted for a libel on the Queen of France.

These rights of foreign powers may be for a time suppressed, and the law may be silent during the flagrance of rebellion and revolution, when rights, both public and private, are overturned and destroyed during the crimes and calamities of civil war. But where, as in the present case, the existing rights of the plaintiff, as sovereign of Hungary, are recognized by the Crown of England, the relief which he seeks in this cause is for the protection of a legal right of universal public importance against the acts of the defendants.

That protection can only be effectually afforded by the relief prayed for in this suit; and there must be a decree against the defendants, according to the prayer of the bill.

*Sir Hugh Cairns.* In the case of *Hullett v. The King of Spain*, the House of Lords said they would not disparage the dignity of the defendant by giving him costs. I must accept the same rule in this case, on behalf of the Emperor of Austria.

*The Vice-Chancellor.* Certainly.

(Extract from *English Reports*, Vice-Chancellor's Court [London, 1906], vol. LXVI, pp. 263-86.)

### § 53. POLICE ACTION BY COLLECTIVE INTERVENTION

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#### THE BLOCKADE OF ZANZIBAR (1888-89)

IN 1888-89 a "very anomalous" blockade of the coasts of Zanzibar was instituted by the British and German admirals, by order of their governments, but in the name of the Sultan, against the importation of "materials of war and the exportation of slaves." The operation "was in reality a measure of high international police, exercised, directly or indirectly, by all the powers of Western Europe who were interested in the locality, for the prevention of a traffic generally recognized by them as cruel and immoral." Italy and Portugal aided actively in the blockade, and France sent a warship to visit vessels flying the French flag. Auxiliary steps were taken on the mainland by the Congo State and the Netherlands.

(Extract from Moore: *Digest of International Law*, vol. VII, pp. 138-39, citing Holland: *Studies in International Law*, pp. 139-40, and M. Rolin-Jaequemyns, in the *Revue de Droit International*, vol. XXI, p. 207, to whom Holland refers.)

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### § 54. SLAVE TRADE

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#### THE CASE OF THE BRIG LAWRENCE (1848)

OPINION of Joshua Bates, *Umpire*, January 4, 1855:

"The umpire appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February, 1853, for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of the owners of the brig *Lawrence*, Captain York, against the British Government, and having carefully examined and considered the papers and evidence produced on the hearing of the said claim, and having conferred with the said commissioners thereon, hereby

reports that the brig *Lawrence*, York, master, under American colors and having an American register and papers, bound from Havana to Cabenda, in Africa, with a cargo of rum, etc., having sprung a leak and put into Gallenas, on the coast of Africa, 10th September, 1848, and being unable to stop the leak there, it was determined to proceed to Sierra Leone, where they could beach the vessel and repair her. She arrived at Freetown on the 22d September and on the 25th she was seized and libeled in the Vice-Admiralty Court for being found in a British port equipped for the slave trade, condemned, and the vessel and cargo decreed forfeited to the Crown.

"The cargo shipped at Havana on board the *Lawrence* consisted of 60 pipes of rum, 116 half pipes of rum, 30 barrels of flour, 4 boxes of beads, 48 boxes of cigars, 1 box woolen caps, 10 barrels of beans, 39 barrels of corn meal, 5 barrels of pork, 5 barrels of beef, 46 buckets, 2 packages tinware, which by charter party were to be delivered at Cabenda, in Africa, for a freight of \$3,250. It is not denied that the papers were in order as an American vessel. The crew, excepting one man, were Spanish and could not speak English, nor could Captain York speak Spanish. There were two supercargoes, one Spanish and one French, on board. Looking at the voyage as a trading operation, it appears simply absurd. The whole value of the cargo would not exceed £600, on which £700 freight was to be paid. But looking at the vessel as to be a slaver whenever the opportunity should offer so to employ her, the cargo and the fittings would appear well arranged for the business and in conformity with the fittings of several vessels under the American flag that had been overhauled by cruisers and suffered to pass on account of the flag, but were soon afterward captured with slaves on board under Spanish or Portuguese colors.

"The African slave trade at the time of this condemnation, being prohibited by all civilized nations, was contrary to the law of nations, and being prohibited by the laws of the United States, the owners of the *Lawrence* could not claim the protection of their own government, and therefore, in my judgment, can have no claim before this commission."

(Extract from Moore: *International Arbitrations*, vol. III, pp. 2824-25.)

## § 55. MARITIME JURISDICTION

## THE SCOTIA

*The Supreme Court of the United States, 1871*

THIS case came on appeal to the United States Supreme Court.

The *Berkshire*, an American sailing vessel, collided with the British steamer *Scotia*, of the Cunard line, in mid-ocean and was sunk and totally lost. From the statement of the case and the opinion it appears that Great Britain and the United States had both adopted the same regulations in regard to the lights for steamships and sailing vessels as were contained in the British Order in Council of January 9, 1863, authorized by virtue of the Merchant Shipping Amendment Act of 1862. By Act of April 29, 1864, Congress had made a similar regulation in regard to the carrying of lights. The *Scotia* was admitted to have complied with these regulations. The *Berkshire*, however, did not carry the red and green lights on her port and starboard side as required by the Act, but carried only a single white light, of which the use was prohibited to sailing vessels and reserved for steamers which were required to carry it at the masthead. As this light was but a few feet above the deck, an approaching steamer, believing it to be at the masthead, would naturally infer that the vessel carrying it was still far distant.

The appellants representing the owners of the sunken vessel, recognizing that they would have no case against the *Scotia* if either the British or American law should be applied, contended that since the collision was between ships of different nations upon the high seas the law applicable must be the law of the high sea, that is, international law.

*Associate Justice Strong*, after a careful review of what occurred and declaring that no country could legislate on the high seas for vessels of another nation, discussed the intent of the American navigation laws and concluded his opinion as follows:

"But we need not affirm that the *Berkshire* was under obligation to show colored lights, or to refrain from showing a white light, merely because of an act of Congress, nor need we affirm that the

*Scotia* can protect herself by setting up the ship's violation of that act. Nor is it necessary to our conclusions that the British rules in regard to lights are the same as ours, though that is an important consideration. We are not unmindful that the English Courts of Admiralty have ruled that a foreigner cannot set up against a British vessel, with which his ship has collided, that the British vessel violated the British mercantile marine act, on the high seas, for the reason, as given, that the foreigner was not bound by it, inasmuch as it is beyond the power of Parliament to make rules applicable to foreign vessels outside of British waters. This decision was made in 1856, in the case of the *Zollverein* (1 Swabey, 96). A similar rule was asserted also in the *Dumfries* (ib. 63), decided the same year; in the *Saxonia* (1 Lushington, 410), decided in the High Court of Admiralty in 1858, and by the Privy Council in 1862. The same doctrine was laid down in 1858, in the case of *Cope v. Doherty*, (4 Kay & Johnson, 367; 2 De Gex & Jones, 626) and in the *Chancellor* (4 *Law Times*, 627), decided in 1861. All these decisions were made before the passage of the Merchant Shipping Amendment Act, which took effect on the 1st day of June, 1863. By that act the same rules in regard to lights and movements of steamers and sailing vessels on the high seas were adopted as those which were prescribed by the Act of Congress of 1864, and by the same act it was provided that the government of any foreign state might assent to the regulations and consent to their application to the ships of such state, and that thereupon the Queen, by Order in Council, might direct that such regulations should apply to ships of such foreign state when within or without British jurisdiction. The act further provided that whenever an Order in Council should be issued applying any regulation made under it to the ships of any foreign country, such ships should in all cases arising in British courts be deemed to be subject to such regulations, and for the purpose thereof be treated as British ships. Historically, we know that before the close of the year 1864, nearly all the commercial nations of the world had adopted the same regulations respecting lights, and that they were recognized as having adopted them. These nations were the following: Austria, the Argentine Republic, Belgium, Brazil, Bremen, Chile, Denmark, Ecuador, France, Great Britain, Greece, Hamburg, Hanover,

Hawaii, Hayti, Italy, Lubeck, Mecklenburg-Schwerin, Morocco, Netherlands, Norway, Oldenburg, Peru, Portugal, Prussia, Roman States, Russia, Schleswig, Spain, Sweden, Turkey, United States, and Uruguay — almost every commercial nation in existence. (See Holt's *Rule of the Road*, page 2.) Had this libel then been filed in a British court, the *Berkshire* must have been found solely in fault, because her white light and her neglect to exhibit colored lights signaled to the *Scotia* that she was a steamer, and directed the *Scotia* to do exactly what she did.

"It must be conceded, however, that the rights and merits of a case may be governed by a different law from that which controls a court in which a remedy may be sought. The question still remains, What was the law of the place where the collision occurred, and at the time when it occurred? Conceding that it was not the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea, was it the ancient maritime law, that which existed before the commercial nations of the world adopted the regulations of 1863 and 1864, or the law changed after those regulations were adopted? Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and

of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British Orders in Council of January 9, 1863, and in our Act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libelants complain took place.

"This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.

"The consequences of this ruling are decisive of the case before us. The violation of maritime law by the *Berkshire* in carrying a white light (to say nothing of her neglect to carry colored lights), and her carrying it on deck instead of at her masthead, were false representations to the *Scotia*. They proclaimed that the *Berkshire* was a steamer, and such she was manifestly taken to be. The movements of the *Scotia* were therefore entirely proper, and she was without fault.

"Decree affirmed, with costs."

(Extract from Wallace: *Reports of the Supreme Court of the United States*, vol. XIV, pp. 170-89.)

## § 56. FOREIGN JUDGMENTS

## HILTON v. GUYOT

*The Supreme Court of the United States, 1894*

Mr. Justice Gray, after stating the case, delivered the opinion of the court from which the following extract is taken:

"It appears, therefore, that there is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller states, — Norway, Portugal, Greece, Monaco, and Hayti, — the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being *prima facie* evidence of the justice of the claim. In the great majority of the countries on the continent of Europe — in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary (perhaps in Italy), and in Spain — as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.

"The prediction of Mr. Justice Story (in sec. 618 of his *Commentaries on the Conflict of Laws*, already cited) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.

"The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim.

"In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that inter-



national law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

"By our law, at the time of the adoption of the Constitution, a foreign judgment was considered as *prima facie* evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

"If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to reëxamination, either merely because it was a foreign judgment, or because judgments of that nation would be reëxaminable in the courts of France.

"For these reasons, in the action at law, the judgment is reversed, and the cause remanded to the Circuit Court with directions to set aside the verdict and to order a new trial.

"For the same reasons, in the suit in equity between these parties, the foreign judgment is not a bar, and, therefore, the decree dismissing the bill is reversed, the plea adjudged bad, and the cause remanded to the Circuit Court for further proceedings not incon-

sistent with this opinion." (Extract from *United States Reports* [1896], vol. 159, pp. 227-29.)

The opinion of the court was by a bare majority of five to four, and its views were contested in a vigorous minority opinion by *Chief Justice Fuller*, with whom concurred Associate Justices Harlan, Brewer, and Jackson. The opening paragraph of the dissenting opinion is as follows:

"Plaintiffs brought their action on a judgment recovered by them against the defendants in the courts of France, which courts had jurisdiction over person and subject-matter, and in respect of which judgment no fraud was alleged, except in particulars contested in and considered by the French courts. The question is whether under these circumstances, and in the absence of a treaty or act of Congress, the judgment is reëxaminable upon the merits. This question I regard as one to be determined by the ordinary and settled rule in respect of allowing a party, who has had an opportunity to prove his case in a competent court, to retry it on the merits, and it seems to me that the doctrine of *res judicata* applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy that there should be an end of litigation." (Extract from *Hilton v. Guyot*, *United States Reports*, vol. 159, p. 229.)

The Chief Justice in the course of his opinion severely condemns the retaliatory doctrine upon which the majority opinion of the court was based:<sup>1</sup> "I cannot yield my assent to the proposition that because by legislation and judicial decision in France that

<sup>1</sup> Compare (Moore, *Digest of International Law*, vol. iv, pp. 102-10): "On the same day the court sustained a Canadian judgment, which the defendant sought to attack on the ground that, although he had appeared in the action, he did not appear at the trial, and that the judgment was entered against him in his absence, without a full examination of the merits. (*Rüchle v. McMullen*, 159 U.S. 235.)"

Although Professor Moore in his *Digest* has given extracts from *Hilton v. Guyot* as decided, in his lectures he has criticised the majority opinion on the ground "that it leaves the courts without any certain criterion and may result in their refusing to accept the judgments of countries that have a highly developed judicial system while accepting the judgments of tribunals in whose decisions there is less reason to feel confidence."

The matter of the execution of foreign judgments relates to the whole question of private international law (conflict of laws) — one of the most important and one of the most difficult in the whole realm of jurisprudence. The reader is referred to the remarkable discussion by Westlake: *International Law*, part 1, *Peace* (Cambridge, 1910), pp. 246-52.

effect is not there given to judgments recovered in this country which, according to our jurisprudence, we think should be given to judgments wherever recovered (subject, of course, to the recognized exceptions), therefore we should pursue the same line of conduct as respects the judgments of French tribunals. The application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." (Dissenting opinion of Chief Justice Fuller in *Hilton v. Guyot*, *United States Reports, Supreme Court*, vol. 159, p. 234.)

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#### § 57. PROTECTION OF THE LIFE AND LIBERTY OF NATIONALS OF OTHER STATES

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#### THE MERCHANT SHIPPING ACT (1876)

DURING the debates in the British Parliament in 1876 upon the bill to amend the Merchant Shipping Acts, there was a divergence of opinion as to the right to apply British legislation to foreign shipping. One member (Mr. T. E. Smith) by way of amendment to the clause empowering the authorities to detain unsafe ships, proposed that this legislation should be extended to foreign ships: "To the objection that the House would go beyond its province in legislating for foreign ships, he replied, we already legislated for them in regard to passengers and surely the lives of sailors would justify equal interference, and such interference was already found practicable in Canada and the United States. Many ships sailing under foreign flags were just the ships the House desired to deal with; they sailed under foreign flags to evade existing British regulations, and the number of such ships would be increased if this legislation were confined to British ships." (Hansard's *Parliamentary Debates* [1876], vol. 228, p. 1148.)

The President of the Board of Trade (Sir Charles Adderley), who was in charge of the bill, admitted the force of this argument, but found himself unable to accept the amendment. "No doubt," he said, "we should as far as possible make all necessary government

interferences weigh equally on our foreign competitors and ourselves. . . . As a general rule foreign ships in our ports were subject to our municipal law and their crews were amenable to our criminal law. Practically, however, our courts did not deal with matters affecting the discipline and management of a foreign vessel or any concerns of her own, but only with what might affect general law, and then only in extreme cases, and that with reference always to their consul. When a foreign ship took emigrants from an English port, the government saw that our rules were observed; but it was our own interest which was then looked after, as it was when a foreign state took precautions against the landing of infected emigrants upon its shores. . . . The proposition of the honorable member for Tynemouth went much further. He proposed to say to foreign ships, 'We will detain you if we think you overloaded or in any way unseaworthy, and you shall not drown your men by running risks which we do not allow our ships to run.' But that would be a great stretch of assumed jurisdiction over foreign subjects, and it would be a strong measure, in order to enforce it, to inflict penalties upon foreigners. . . . If the proposal were agreed to, we must be prepared for retaliation." (*Parliamentary Debates* [1876], vol. 228, pp. 1149-50.)

The amendment in the form presented was not carried, but jurisdiction in certain cases of overloading was extended over foreign vessels by section 13 of the act, as follows:

"Where a foreign ship has taken on board all or any part of her cargo at a port in the United Kingdom, and is whilst at that port unsafe by reason of overloading or improper loading, the provisions of this act with respect to the detention of ships shall apply to that ship as if she were a British ship, with the following modifications. . . ." (*English Law Reports* [1876], *Statutes*, vol. XI, p. 498.)

Later in the session the Chancellor of the Exchequer (Sir Stafford Northcote) announced that it was the intention of the government to propose an additional clause with regard to deckloads, and that such clause would apply to foreign as well as to British ships. But at the same time he acknowledged "it was a serious and difficult matter how to deal with foreign ships, in consequence of the questions that might arise in connection with international

law from British shipping going into the ports of all the nations in the world and that the same rules and laws this country might lay down for the treatment of foreign ships in our ports might be applied to British ships in foreign ports." (*Parliamentary Debates* [1876], vol. 228, p. 1781.)

Sir Henry James thought that the government had acted boldly and courageously, but that the clause was a serious one: "For the first time we were setting the example of legislating for offenses committed out of our own jurisdiction; because the offense would be committed when the cargo was placed on deck, and by persons who were ignorant of it. . . . Again, the penalty of the clause upon the foreigner would substantially mean imprisonment. . . . Foreigners in that way would learn that they would be sent to prison, though what they had done was no breach of their own law, and simply because they had broken a law of our own of which they had never heard." (*Parliamentary Debates* [1876], vol. 228, p. 1925.)

The Chancellor of the Exchequer replied that, "although at first sight it did appear that any attempt to deal with foreign ships might carry them to a dangerous extent, the more he had considered the subject, the more he felt that with care and caution, by giving foreign countries reasonable notice of their proceedings, and by exercising reasonable fairness in the execution of the law, the danger was not one that need be attended with very serious consequences. . . . The government felt that in bringing forward the clause, which they did with considerable anxiety, they were doing what was best for the promotion of the great objects of the bill and for the interests of the country." (*Parliamentary Debates* [1876], vol. 228, p. 1932.)

As the legislation respecting deckloads was to apply only to cargoes of timber, the Scandinavian shipping interests were more affected than any other foreigners. Accordingly, when an earlier amendment to the same effect was proposed by Mr. Plimsoll, the Government of Norway and Sweden, in a note of June 16, 1876, indicated its views, in part, as follows:

" . . . The definite adoption of the amendment would have the inevitable result of increasing the freight of timber cargoes during a great part of the year, but this inconvenience, although con-

siderable, ought naturally to be tolerated, if the restriction imposed by the House of Commons is required in the interests of humanity.

"The Government of the King, after an examination of the question undertaken some years ago, and recently resumed, do not believe that there is any necessity for proceeding with such a rigorous measure. . . .

"It is true that the right limit is difficult to fix, but the King's Government, knowing that Her Majesty's Government have carefully considered the circumstances before fixing the maximum of three feet, earnestly desire that Parliament should stop at that point, and that they trust that more mature consideration will cause the House of Commons to modify its decision. . . .

"If this amendment were the result of a complete and profound examination of the question, the King's Government would not have made themselves the organ of the interests affected by its adoption, but not being able to allow that the measure proposed by Mr. Plimsoll is justified in this way, the Government of the King would be glad to think that Her Majesty's Government will kindly take into consideration the foregoing observation." (*Parliamentary Accounts and Papers* [1876], vol. 66, pp. 96-97.)

As finally enacted, section 24 is as follows:

"After the first day of November, one thousand eight hundred and seventy six, if a ship, British or foreign, arrives between the last day of October and the sixteenth day of April in any year at any port in the United Kingdom from any port out of the United Kingdom, carrying as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, any wood goods coming within the following descriptions . . . the master of the ship, and also the owner, if he is privy to the offense, shall be liable to a penalty not exceeding five pounds for every hundred cubic feet of wood goods carried in contravention of this section, and such penalty may be recovered by action or on indictment or to an amount not exceeding one hundred pounds (whatever may be the maximum penalty recoverable) on summary conviction." (*English Law Reports* [1876], *Statutes*, vol. XI, pp. 502-03.)

In regard to the application of the act to American vessels, Moore, in his *Digest of International Law* (vol. II, pp. 282-83), says:

"September 28, 1876, Sir Edward Thornton, British Minister at Washington, communicated to the Department of State a copy of the Merchant Shipping Act, 1876, and called attention to the clause with respect to the overloading and improper loading of foreign ships in the United Kingdom, and particularly to section 24, imposing certain penalties in case of the arrival of a ship, whether British or foreign, between the last day of October and the 16th of April, at any port of the United Kingdom from any port out of the United Kingdom, carrying deck cargo in violation of the act; and in subsequent notes of January 22 and 29, 1877, Sir Edward transmitted reports made by officers of the Board of Trade with reference to the alleged infraction of section 24 by certain American vessels.

"The Department of State replied that, as attention was thus particularly called to the questions under section 24, it seemed proper to state that the right to impose penalties on the master or owner of an American vessel, sailing from a port of the United States, for the manner in which the cargo was laden or stored, was of so doubtful a character that, however wise or beneficent the intent of the act might be, the Government of the United States 'cannot but invite the attention of Her Majesty's Government particularly thereto, before further steps are taken in Great Britain to enforce obedience to the law in these particular cases, and before any steps be taken toward the enforcement of fines in these or similar cases.'

"The representations of the United States 'appear to have received the careful attention of the Government of Great Britain, and toward the close of the year 1877, the Minister of the United States at London received a note from Lord Derby, justifying the provisions of the act adverted to, which had been specially made the subject of complaint, as not inconsistent with the principles of international law, or with the practice of nations in such matters,' and expressing the hope that the United States would 'yield the provisions of the act mentioned a friendly support, by enjoining its observance on the part of American shippers and owners of vessels,

in the interest of humanity.' The subject thereafter 'failed to become one of special action on the part of the United States.'

"In 1886, the British Minister having reported the arrival of an American vessel in London with a deck cargo of heavy wood in contravention of section 24, he was advised that the Secretary of the Treasury had called the attention of collectors of customs to the law, with a view to notifying masters of vessels sailing from the United States of its provisions. It was observed, however, that it was not to be understood that the notification would reach all such masters, and that therefore the action of Her Majesty's Government in such cases arising in the future should not be based on the supposition that the masters of all American vessels were acquainted with the law."

The enactments relating to merchant shipping were consolidated by the Act of 1894, the provisions of the Act of 1876 respecting foreign shipping remaining in effect unchanged. (*Statutes* [1894], §§ 451, 462.) In consequence, however, of the report, in 1905, of a select committee on the statutory requirements for foreign ships, Parliament passed an act in 1906 amending the Merchant Shipping Acts by the addition, amongst others, of several provisions affecting foreign shipping. The British load-line provisions were made to apply to foreign ships "while they are within any port of the United Kingdom," the power to detain unsafe ships of foreign nationality was extended to include cases of defective equipment, and power was given to apply rules as to life-saving appliances to foreign ships "provided that His Majesty may by Order in Council direct that these provisions shall not apply to any ship of a foreign country in which the provisions in force relating to life-saving appliances appear to His Majesty to be as effective as the provisions of Part v of the principal act, on proof that this provision was complied with in the case of that ship." (*Statutes* [1905-06], pp. 248-49.) But the most significant extension of jurisdiction in 1906 was that laid down in the section relating to foreign ships carrying cargoes of grain, as follows:

"If after the first day of October, one thousand nine hundred and seven, a foreign ship laden with grain cargo arrives at any port in the United Kingdom having the grain cargo so loaded



that the master of the ship, if the ship were a British ship, would be liable to a penalty under the provisions of Part v of the principal act relating to the carriage of grain, the master of that foreign ship shall be liable to a fine not exceeding three hundred pounds." (*Statutes* [1905-06], p. 248.)

The provisions respecting deckloads of timber remain substantially as in 1876.

On October 13, 1910, an order in council was issued exempting Swedish vessels complying with Swedish regulations from detention for non-compliance with the Merchant Shipping Acts as to overloading, as follows:

"Whereas the Board of Trade have certified that certain statutory regulations which have been approved by the Swedish Government relating to overloading, so far as regards the assignment of loadlines to Swedish ships, are equally effective with the corresponding regulations in force in this country respecting the assignment of loadlines to British merchant ships:

"Now, therefore, His Majesty in Council doth direct that on proof that Swedish ships have complied with the aforesaid Swedish Regulations, such ships shall not, when in ports of the United Kingdom, be liable to detention for non-compliance with the provisions of the Merchant Shipping Acts relating to overloading, nor shall there arise any liability to any fine or penalty which would otherwise arise for non-compliance with those provisions." (*British and Foreign State Papers*, vol. 103, p. 165.)

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### THE JEWS IN PERSIA (1897)

In May, 1897, the Minister of the United States at Teheran interposed unofficially his good offices in behalf of the Jews in that city, who were then being subjected to mob violence at the hands of the Mohammedans. His course was approved with the statement that his "good offices in this somewhat delicate question seem to have been discreetly used in the interest of common humanity and in accordance with the precepts of civilization."

(Taken textually from Moore: *Digest of International Law*, vol. IV, p. 592.)

§ 58. SUCCOR

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## UNITED STATES AND ITALIAN EARTHQUAKES (1908)

*Ambassador Griscom to the Secretary of State*

[Telegram]

AMERICAN EMBASSY,  
Rome, December 29, 1908.

A terribly disastrous earthquake occurred yesterday in Sicily and southern Italy. The town of Messina is said to be entirely destroyed. There are no official estimates of mortality, but the newspapers announce 50,000 killed. I saw the King this morning before he left for the scene and expressed to him the heartfelt sympathy of the President and the American people. He informed me that the latest news is that fires are everywhere adding to the disaster. I am trying to obtain news of our consulate at Messina and of other Americans who may have suffered.

GRISCOM.

*President Roosevelt to the King of Italy*

[Telegram]

WASHINGTON, December 29, 1908.

With all my countrymen, I am appalled by the dreadful calamity which has befallen your country. I offer my sincerest sympathy. American National Red Cross has issued appeal for contributions for the sufferers and notified me that they will immediately communicate with the Italian Red Cross.

THEODORE ROOSEVELT.

*Ambassador Griscom to the Secretary of State*

[Telegram]

AMERICAN EMBASSY,  
Rome, December 30, 1908.

Having received no word from consul at Messina and Palermo, have asked the Foreign Office to furnish me information. They have promised to use every effort through their army and navy

officers to obtain immediate news. British Consul at Messina is reported injured and his wife and child dead. It is reported that ninety Americans were in the Hotel Trinacria at Messina, which is reported totally destroyed. It is known that some of the guests escaped.

The Foreign Office informs me that several foreign nations are hurrying warships to the scene to offer assistance. I think it would be highly appreciated if we sent one or two warships at earliest possible moment. Much assistance might be rendered American citizens. Will you authorize sending Naples Vice-Consul to Messina immediately?

GRISCOM.

*The Acting Secretary of State to Ambassador Griscom*

[Telegram]

DEPARTMENT OF STATE,  
Washington, December 30, 1908.

The National Red Cross will cable to-morrow for account of the Italian Red Cross \$50,000 for the relief of the earthquake sufferers.

BACON.

*The Acting Secretary of State to Ambassador Griscom*

[Telegram]

DEPARTMENT OF STATE,  
Washington, December 31, 1908.

Regret no warships could reach Italy before the arrival of the fleet in those waters about January 14, about which we will cable you further. *Scorpion* ordered last night from Constantinople. You may possibly find her of use in rendering assistance to American citizens or others in distress or to facilitate communication. Telegram 31st received. May draw for \$5,000 if necessary.

BACON.

*Ambassador Griscom to the Secretary of State*

[Telegram]

AMERICAN EMBASSY,  
Rome, December 31, 1908.

The Prime Minister has invited me to proceed to Messina and offered steamship accommodations from Naples. I have accepted

the offer, in order to avail of exceptional opportunity of getting transportation for two or three consular officers and to profit by special opportunities which are offered me for obtaining and sending news. I leave Rome January 1, taking with me Vice-Consul Cutting from Milan, and will place him temporarily in charge of consulate at Messina and secure recognition of Italian Government; also taking interpreter of the embassy and one of the staff of Naples Consulate, and Winthrop Chanler, a private citizen, to do special work searching for and relieving American citizens. As soon as I have organized and distributed the work I will return to Rome. Expect to be absent few days only. I would be glad to have a few thousand dollars in case necessary for relieving Americans.

A newspaper telegram this morning from Messina states that Lupton is dead, as well as Consul Cheney and family and Vice-Consul Pierce and family. The nephew of the German Consul at Messina, on arrival at Naples, confirms death of Consul Cheney and family.

The Foreign Office this morning consider that the estimate of 100,000 dead is not exaggerated.

The Foreign Office informs me that foreign aid for sufferers will be gratefully accepted, owing to immensity of disaster.

GRISCOM.

*The Acting Secretary of State to Ambassador Griscom*

[Telegram]

DEPARTMENT OF STATE,  
Washington, December 31, 1908.

American Red Cross desire following delivered to Italian Red Cross:

"Please advise if clothing, food, desired from America. Cable our expense, brief statement, character, magnitude Italian Red Cross relief operations. Red Cross, Washington, or through American Embassy."

BACON.

*The Acting Secretary of State to Ambassador Griscom*<sup>1</sup>

[Telegram]

DEPARTMENT OF STATE,  
Washington, December 31, 1908.

Draw on Secretary of State for \$70,000 and pay to Italian Red Cross for relief of sufferers, taking duplicate receipts. Fifty thousand contributed by American Red Cross and \$20,000 by Louis Klopsch, of *Christian Herald*.

BACON.

(*Foreign Relations of the United States, 1910*, pp. 499-501.)

<sup>1</sup> The American Red Cross, between December 31, 1908, and November 23, 1909, transmitted through the State Department, and other channels of communication, the sum of \$90,755.69 for the relief of the earthquake sufferers. The *Christian Herald* transmitted through the Department of State \$35,000. (*Foreign Relations of the United States, 1910*, p. 501.)

## CHAPTER XI

### COÖPERATIVE ACTION BETWEEN A GROUP OF STATES FOR THE PROTECTION OF THEIR COM- MON INTERESTS

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#### § 59. INTERNATIONAL COMMISSIONS FOR THE REGULATION OF RIVERS

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#### NAVIGATION OF EUROPEAN RIVERS (1814-15)

THE "navigation of the Rhine, from the point where it becomes navigable unto the sea, and *vice versa*," was, by the Peace of Paris of May 30, 1814, declared to be "free, so that it can be interdicted to no one;" and it was provided that at the congress to be held at Vienna "attention" should "be paid to the establishment of the principles according to which the duties to be raised by the states bordering on the Rhine may be regulated, in the mode most impartial and the most favorable to the commerce of all nations." And it was further stipulated that "the future congress, with a view to facilitate communication between nations, and continually to render them less strangers to each other," should "likewise examine and determine in what manner the above provisions can be extended to other rivers which in their navigable course separate or traverse different states."

By the Treaty of Vienna of June 9, 1815, the powers whose states were "separated or traversed by the same navigable river" engaged "to regulate, by common consent, all that regards its navigation," and for this purpose to name commissioners who should adopt as the bases of their proceedings certain principles, the chief of which was that the navigation of such rivers, "along their whole course, . . . from the point where each of them becomes navigable to its mouth shall be entirely free, and shall not,

in respect to commerce, be prohibited to any one," subject to regulations of police. In order to assure the application of this principle, articles were inserted expressly regulating in certain respects the free navigation of the Rhine; and it was provided that "the same freedom of navigation" should "be extended to the Necker, the Mayne, the Moselle, the Meuse, and the Scheldt, from the point where each of them becomes navigable to their mouths." And in order to "establish a perfect control" over the regulation of the navigation, and to "constitute an authority which may serve as a means of communication between the states of the Rhine upon all subjects relating to navigation," it was stipulated that a central commission should be appointed, consisting of delegates named by the various bordering states, which commission should regularly assemble at Mayence on the 1st of November in each year. Regulations for the navigation of the Moselle and the Meuse were to be drawn up by those members of the central commission whose governments should have possessions on the banks of those rivers.

(Extract from Moore: *Digest of International Law*, vol. I, p. 628.)

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## § 60. INTERNATIONAL UNIONS

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### UNIVERSAL POSTAL UNION

If, in the postal relations of the independent states which compose the family of nations, the ordinary principle of independent action held sway, great would be the confusion and inconvenience to every individual in the whole world as well as to the governments responsible for the maintenance of these communications. Different rates of postage would prevail to meet the exigencies and interests of the different states. Some states would have a uniform rate for the whole country, while others would be divided in much the same way as the United States is now apportioned into zones for the parcels post. Those states over whose territory other states were obliged to ship their mail might selfishly take advantage of the situation to exact exorbitant charges, although such action might well bring in its turn retalia-

tory regulations against it on the part of other states. This would again make the confusion worse confounded, if it did not actually lead to a suspension of postal relations from time to time. These are only a few of the inconveniences which would result from such a situation. In point of fact inconveniences such as these did actually exist before the formation of the *Union Postale Universelle* (Universal Postal Union). The name is well deserved, for the Union which was first established by the Treaty of October 9, 1874, now includes about threescore states and colonies, whose combined territory forms "a single postal territory for the reciprocal exchange of correspondence between their post-offices." (Article 1, Universal Postal Convention, May 26, 1906.)

The mechanism of this Union consists of three essential parts:

- (1) The convention establishing the Union;
- (2) The bureau established at Berne;
- (3) Periodic congresses for the modification or revision of the fundamental act of the convention upon which the Union was based.

The convention, like any treaty, depends for its authority upon the consent of the signatory states, so that the regulations which it adopts are of necessity such as find universal favor and are applicable to all signatory states whatever their degree of civilization and commercial development.

Whatever inconveniences result from the application of the convention as adopted can be modified by unanimous agreement at the succeeding congress to which the signatories send delegates with the requisite full powers. The full appreciation of the needs of the situation make the delegates at these conferences ready to reconcile their differences in a large spirit of compromise so as to secure as far as possible a uniform rule of practical application. But here, as at The Hague, the curse of the *liberum veto*, or right of any state to block by its refusal what the others may wish to adopt, limits the efficacy of the regulations contained in the convention. Any group of states is free, however, to enter upon a restricted union of broad application; and many of the most important postal regulations between the states rest still upon bilateral treaties — for example, the two-cent postage between the



United States and Great Britain. The postal convention, as modified by successive congresses, has been able to effect such important regulations as a uniform charge of twenty-five centimes for twenty grams, while the color of the stamp for this charge must be blue in all countries. Each separate country interprets the official French designations into the nearest practical equivalent in its own units, so that in the United States this makes the charge for foreign postage five cents. The charges for transit through other countries have been standardized and the exorbitant demands of certain countries curtailed.

The most interesting feature of the Postal Union is the International Bureau established at Berne. To it is delegated the important task of preparing the work of the succeeding congress, at which the director and vice-director are present to advise the congress, without of course enjoying any vote in its decisions. The Bureau publishes a journal of information in three languages, French, English, and German, in three parallel columns, although the official language of the Union is French and all the discussions at the congress are conducted in French.

In the interval between the meetings of the postal congress the International Bureau is often called upon to give its advice in regard to the interpretation of the provisions of the convention. It may likewise be asked to act as an arbitrator to settle any disagreement between two members of the Union in reference to the application of the convention. The Bureau may also be asked to settle the accounts between those administrations which care to make use of its services. The Bureau also serves as an intermediary to secure any desired modification of the convention during the interval between the congresses. Provided that three administrations make the appeal, the Bureau submits the proposal to the other administrations. Article 26 of the convention permits such modifications without the convocation of the congress and regulates what the vote shall be, — unanimity, two-thirds, or a simple majority.<sup>1</sup>

<sup>1</sup> It is hard to understand why, when a majority is allowed to legislate in this way for the minority, the same simple method cannot be adopted at the meetings of the congress. But governments, nevertheless, jealously adhere to the principle of unanimity.

With a view to the apportionment of the expenses of maintenance, the separate administrations composing the Union are divided into seven classes, on the basis of the volume of their international postal relations. This convenient and equitable recognition of the economic inequality of the states has been adopted as a basis for the assessment of the expense of maintaining the International Bureau at The Hague in accordance with Article 50 of the Convention for the Peaceful Settlement of International Differences signed October 18, 1907.

Although war interrupts postal relations between states engaged in conflict, the suspension is only temporary, and with the return of peace the postal relations of the erstwhile belligerents are renewed under the empire of the convention. This is an advantage international conventions possess, since ordinary bilateral treaties are definitely terminated by the outbreak of hostilities.

Many other unions for the regulation and administration of interests common to a large group of states have been established. While the independent states are laboriously working out their political problems and discussing the organization of a world-state, each one of these international unions, in its special but important sphere, is acting as an administrative agent for the world.

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- Ministerial: pertaining to an act or duty performed in accordance with legal authority rather than with regard to propriety, judgment, etc.; mandatory, as opposed to judicial or discretionary. (Standard.)
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